TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 100.

THE BUTTE CITY WATER COMPANY, PLAINTIFF IN ERROR,

vs.

BEN BAKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED AUGUST 26, 1904.

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(19,056.)

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THE BUTTE CITY WATER COMPANY, PLAINTIFF IN ERROR,

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INDEX.

	Original.	Print.
aption	*a*	1
ranscript from the district court of Silver Bow county	1	1
Statement on motion for a new trial and bill of exceptions	2	1
Complaint	2	2
Answer	5	3
Evidence for plaintiff	7	4
Testimony of Ben Baker	8	5
M. J. Sheean	9	5
Notice of location of Keynote lode	10	6
Testimony of Ben Baker (recalled)	13	7
A. J. Roberson	28	14
Plaintiff rests	32	17
Motion for nonsuit	32	17
Evidence for defendant	32	17
Testimony of John T. Lewis	33	17
Notice of location of Keyno mine	36	19
Objections to declaratory statement	37	19
Testimony of M. L. McDonald	39	20
Further objections to declaratory statement	48	24

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	Original.	Print
Testimony of M. L. McDonald (recalled)	49	25
Roland Hall	51	26
Roland Hall (recalled)	54	28
John T. Lewis (recalled)	55	28
F. H. Miles	59	30
S. H. Northey	60	31
Eugene Carroll	61	31
J. E. Healy	62	32
Defendant's Exhibit B—Notice of plaintiff to defendant of intention to work claim	63	32
Testimony of Eugene Carroll (recalled)	64	33
Defendant rests	65	33
Evidence for plaintiff in rebuttal	65	33
Testimony of Wm. Sowden	65	33
Evidence closed	66	34
Argument	66	34
Instruction No. 1—Given	67	34
No. 2—Given	67	35
No. 3—Given	68	35
No. 4—Given	70	36
No. 5—Given	70	36
No. 6—Given	71	36
No. 7—Given	72	37
No. 8—Given	72	37
No. 9—Given	73	37
No. 10—Given	73	38
Defendant's instruction No. 8—Refused	74	38
No. 10—Refused	74	38
No 11—Refused	74	39
No. 12—Refused	75	39
No. 13—Refused	75	39
No. 14—Refused	76	39
No. 15—Refused	76	40
No. 18—Refused	77	40
Verdict	78	40
Special findings	78	41
Motion for judgment	79	41
Order for judgment	80	42
Judgment	80	42
Notice of intention to move for new trial	84	43
Time to prepare bill of exceptions, &c	84	44
Affidavit of service of affidavit of M. L. MacDonald	85	44
Affidavit of M. L. MacDonald	86	45
Specification of errors of law	87	46
Specification of insufficiency of evidence	93	49
Judge's certificate to bill of exceptions	99	52
Affidavit of T. B. Lee	99	52
Notice of appeal	100	53
Clerk's certificate	102	53
Opinion	104	54

	Original	Print
Order for judgment	112	57
Judgment	113	57
Petition for writ of error	114	58
Assignment of errors	115	58
Writ of error	119	60
Affidavit of service of writ of error	121	61
Bond on writ of error	122	62
Clerk's certificate	124	63
Citation	125	63
Affidavit of service of citation	126	64

a In the Supreme Court of the State of Montana.

BEN BAKER, Respondent,
vs.
BUTTE CITY WATER COMPANY, Appellant.

Appearances: For respondent, J. E. Healy, Esq.; for appellant, Messrs. Wellcome & Root, William H. De Witt, T. Bailey Lee.

Transcript on Appeal

From the district court of the second judicial district of the State of Montana in and for the county of Silver Bow.

Filed July 20, 1900.

——— ———, *Clerk.*

1 In the Supreme Court of the State of Montana.

BEN BAKER, Respondent,
vs.
BUTTE CITY WATER COMPANY, Appellant.

Appearances: For respondent, J. E. Healy, Esq.; for appellant, Messrs. Wellcome & Root, William H. De Witt, T. Bailey Lee.

Transcript on Appeal

From the district court of the second judicial district of the State of Montana in and for the county of Silver Bow.

2 In the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow.

BEN BAKER, Plaintiff,
vs.
BUTTE CITY WATER COMPANY, Defendant. } No. 7618.

Statement on Motion for New Trial and Bill of Exceptions.

Be it remembered, that this case was commenced by the filing of a complaint on November 1st, 1898, which complaint is in words and figures as follows, to-wit:

(Title of Court and Cause.)

Complaint.

The plaintiff complains and for cause of action alleges:

That on the 13th day of October, eighteen hundred and ninety-eight (1898) he was possessed and the owner and entitled to the possession and still is entitled to the possession of that certain tract of land situated in the county of Silver Bow, State of Montana, described as follows: The Keynote Lode mining claim, located
3 in the Highland mining district in the county of Silver Bow, State of Montana, being a relocation of the Ballarat tunnel, and situated about three-fourths of a mile east of the old town of Highland and about three-fourths of a mile south of Highland creek.

The exterior boundaries of the said mining claim are distinctly marked on the ground by posts and monuments and trees in place set and marked at each corner of the said lode and claim so that its boundaries can be readily traced, as follows, to-wit:

Beginning at the southwest corner, number one, which is a tree in place blazed and marked corner No. one, Key Note lode, southwest corner, October 13th, 1898.

And running from said corner to the southeast corner, six hundred feet in a northeasterly direction to the southeast corner which is a tree in place marked corner number two, Keynote lode, southeast corner, October 13th, 1898.

Said trees in place have a mound of stones and earth at least four feet in diameter, and two feet in height around them.

And running thence to corner number three the northeast corner which is a post of lawful size and character, to-wit: at least four inches square by four feet six inches in length, set one foot in the ground, with a mound of stones and earth, at least four feet in diameter, and at least two feet in height, set around the said
4 post. Said corner is marked northeast corner number three, Keynote lode, October 13th, 1898.

And running from said corner number three to the northwest corner number four, which is a post of lawful size and character, to-wit, at least four inches square by four feet six inches in length set one foot in the ground, with a mound of stones and earth at least four feet in diameter and two feet in height around said post. Said corner of said lode is marked northwest corner Keynote lode, October 13th 1898.

The distance from corner number one to corner number two is six hundred feet, from corner number two to corner number three is fifteen hundred feet, and from corner number three to corner number four is six hundred feet, and from corner number four to corner one is fifteen hundred feet.

2. That while the plaintiff was the owner, possessed and entitled to the possession of said tract of land and mining premises, the defendant which the plaintiff alleges is a corporation organized and existing under and by virtue of the laws of the State of Montana, afterwards, on or about the 17th day of October, 1898, and without right or title, entered into the possession of the said demanded premises and ousted and ejected the plaintiff therefrom and now unlawfully withholds the possession thereof from the plaintiff to his damage in the sum of five hundred dollars.

5 Wherefore the plaintiff prays judgment against the defendant for the recovery of the said demanded premises and for the sum of five hundred dollars damages for withholding the possession thereof, and for costs of this action.

J. E. HEALY,
Attorney for Plaintiff.

(Duly verified.)
(Filed November 1, 1898.)

Thereafter and on the 22nd day of December 1898, the defendant having been duly served with summons filed its answer which is in words and figures as follows, to-wit:

(Title of Court and Cause.)

Answer.

Comes now the above named defendant and for its answer to the complaint of the plaintiff herein denies and alleges as follows, to-wit:

I.

Defendant denies that on the 13th day of October, 1898, or at any other time or at all, the plaintiff was possessed or was the owner or was entitled to the possession of the premises described in the plaintiff's complaint, and denies that the plaintiff is still or was at any time entitled to the possession of that certain tract of land described in plaintiff's complaint as the "Keynote" Lode mining claim or otherwise, located in the Highland mining district, Silver Bow county, Montana, or elsewhere, and denies that the said pre-

6 tended "Keynote" mining claim was a relocation of the Ballarat, and denies that the same or any mining claim, claimed, owned or possessed by the plaintiff is situated three-fourths of a mile east of the old town of Highland and three-fourths of a mile south of Highland creek or elsewhere; denies that the exterior boundaries of the said pretended mining claim are distinctly or at all marked on the ground by posts or monuments and trees in place, set and marked at each corner of said pretended lode claim so that its boundaries can be readily or at all traced.

II.

Defendant denies that while the plaintiff was the owner, possessed or entitled to the possession of said pretended tract of land and mining premises, or at any other time or at all, defendant, on the 17th day of October 1898, or at any other time or at all, without right, or title or otherwise, entered into the possession of the said described premises and ousted and ejected the plaintiff therefrom, and denies that the defendant now unlawfully or otherwise, withholds possession of the said pretended mining claim from the plaintiff to his damage in the sum of five hundred ($500.00) or any other sum.

Further answering defendant answers affirmatively that at all times mentioned in plaintiff's complaint it was and now is the owner of, in the possession of, and entitled to the possession of the premises described in plaintiff's complaint.

7 Wherefore, defendant having fully answered prays for a judgment of this court adjudging the defendant to be the owner of the premises in controversy, and for its costs and disbursements made herein and that the plaintiff take nothing by this action.

WELLCOME & ROOT,
Attorneys for Defendant.

Service of the foregoing answer accepted this 22nd day of September 1898 and copy rec'd.

J. E. HEALY,
Attorney for Plaintiff.

(Duly verified.)
(Filed Dec. 22, 1898.)

Thereafter and on the 19th day of July 1899 this case came on regularly for trial before Honorable John Lindsay, judge, and the jury was regularly called, examined and sworn to try the case, Mr. James E. Healy appeared for the plaintiff and Messrs. Jessie B. Root and T. B. Lee appeared for the defendant,—evidence was introduced on the part of both the plaintiff and defendant which evidence and the whole thereof, both that of witnesses and papers and documents are as follows, to-wit: and also along with said evidence are contained all of the objections made by the defendant and rulings by the court upon all such objections and exception taken by the defendant to all of such rulings:

8 BEN BAKER, the plaintiff, after being first duly sworn, testified as follows in his own behalf.

Direct examination.

By J. E. HEALY:

The WITNESS: My name is Ben Baker; I am the plaintiff in this action; I was born in the State of Kentucky; I am fifty five years old; I work at most everything. I am mining a good deal now; I have been mining and prospecting since '65; I remember the 13th day of October, 1898; on that day I discovered a quartz vein in the Highland Mountain district and sunk a shaft; the vein I discovered disclosed quartz from the surface on down; it was mineral; it went $2.50 in gold; the discovery shaft I sunk was in the neighborhood of eleven feet deep; it was eleven feet from the lowest rim of the shaft; the dimensions of the shaft were something like two feet by four and a half feet; at that time I set up a notice of location; I nailed that notice of location up against a tree right close to the discovery in a box; I claimed seven hundred and fifty feet in length on each side; that was fifteen hundred feet in all.

Q. What distance on either side with reference to width?

Objected to for the reason that the notice of location is the best evidence.

Objection overruled.

Exception.

Q. How many feet on either side?

9 A. Supposed to be fifteen hundred feet long.

Q. But in width, how many feet on either side of the discovery?

A. Three hundred.

M. J. SHEEAN, after being first duly sworn testified as follows, on the part of the plaintiff.

Direct examination.

By J. E. HEALY:

The WITNESS: I am deputy clerk and recorder of Silver Bow county; I have charge of the records of quartz lodes locations in this county; this book which you hand me is Book "S" of location notices of Silver Bow county; on page 47 of that book I find the record of the notice of a quartz location; it is the notice of the Keynote quartz lode; it was located by Ben Baker on the 13th day of October 1898.

Plaintiff offers in evidence, the record of the Keynote quartz lode claim in evidence.

Defendant objects to the introduction of the record in evidence, for the reason that upon the face of the notice of location it purports

to be a relocation of the Ballarat tunnel; and upon the further grounds that the alleged notice of relocation does not state whether a new discovery was sunk or whether the old discovery of the Ballarat was sunk ten feet deeper; it is also objected to upon the further grounds, that a foundation has not been laid for it to be
10 introduced in evidence; that is, no evidence has been introduced showing the point at issue, to-wit, that there ever was any such a mining location as the Ballarat tunnel location, and that it is not proper to be introduced in evidence until these facts have first been proven: It does not comply with section 3615 of the Political Code.

By the COURT: I desire to inform myself upon this matter, and will take the matter under advisement until 2 o'clock p. m.

Adjourned until 2 p. m.—to-day—July 20th, 1899.

2 O'CLOCK P. M., *July 19th*, 1899.

By the COURT: The court has concluded to overrule the objection to the introduction of the location notice of the Keynote lode in evidence.

Exception.

Location notice commencing on page 47 and ending on page 50 of Book of Quartz Lode Locations of Silver Bow County, read to the jury, and is in words and figures as follows, to-wit:

Notice of Location.

Notice is hereby given that the undersigned Ben Baker who is a citizen of the United States did on the 13th day of October, eighteen hundred and ninety-eight discover a quartz lode or vein,
11 bearing gold, silver, lead and other valuable metals, which lead has well defined walls and showing a well defined vein and crevice and other valuable deposits to be known as the Keynote quartz lode mining claim and did on the same day locate and claim by virtue of chapter six of title thirty-two of the Revised Statutes of the United States and the laws of the State of Montana, seven hundred and fifty (750) feet in a southeasterly direction, and seven hundred and fifty feet (750) in a northwesterly direction from the center of the discovery shaft at which said shaft a notice of location is posted, and at the lead discovered in said shaft and three hundred feet on each side of the middle and center of said vein at the surface, comprising in all fifteen hundred feet in length and six hundred feet in width, the general course and direction of said vein being southeasterly and northwesterly. Said lode is situated in the Highland mining district in the county of Silver Bow in the State of Montana, and adjoins an unknown claim on the south and is a relocation of the Ballarat tunnel and is situated about three-fourths

of a mile east of the old town of Highland and about three-fourths of a mile south of Highland creek.

And the vein on said lode so discovered and exploited by said shaft is cut and shown by said work at least ten feet below the lowest rim of said shaft and below the surface, and the size, character and dimensions of said discovery shaft are as follows, to-wit, ten (10) feet deep, six (6) feet and three (3) feet wide.

The exterior boundary of said mining claim *are* distinctly marked on the ground by the posts and monuments and trees in place, set and marked at each corner of said lode and claim so that its boundaries can be readily traced as follows, to wit:

Beginning at the south-west corner No. 1, which is a tree in place blazed and marked "Corner number one, Keynote lode southwest corner" October 13th 1898 running from said corner to the south-east corner six hundred feet in a northeasterly direction to the said southeast corner which is a tree in place marked corner number two, Keynote lode, southeast corner, October 13th, 1898. Said trees in place have mounds of earth and stone four feet in diameter and two feet in height around them, and running thence to corner number three, the northeast corner which is a post of lawful size and character, to-wit: at least four inches square by four feet six inches in length, set one foot in the ground with a mound of earth and stone at least four feet in diameter and at least two feet in height set around the said post. Said corner is marked northeast corner number three, Keynote lode, October 13th, 1898, and running from said corner number three to the northwest corner number four which is a post of
13 lawful size and character, to-wit, at least four inches square by four feet six inches in length, set one foot in the ground, a mound of earth and stones at least four feet in diameter and two feet in height around said post, said corner of said lode is marked northwest corner Keynote lode, October 13th, 1898. The distance from corner number one to corner number two is six hundred feet, from corner number two to corner number three is fifteen hundred feet, and from corner number — to corner number four is six hundred feet, and from corner number four to corner number one is fifteen hundred feet.

BEN BAKER,
Locator and Claimant.

(Duly verified, stamped and filed.)

BEN BAKER the plaintiff, after being recalled, testified as follows in his own behalf.

Direct examination.

By J. E. HEALY:

The WITNESS: After I made my location of this claim and recorded it, I next seen this claim on the 13th of this month; when I was there last time, the northwest corner of the claim had been

changed from where it was originally placed; the corner had been moved some two hundred feet from where we laced it; I should judge it had been moved some one hundred and seventy-five or eighty feet from where we originally placed —, up the hill, I could not tell exactly how far it had been moved.

Cross examination.

By Mr. ROOT:

The WITNESS: I cannot tell exactly how far the stake had been moved, because I did not measure it, I stepped it off; I posted my notice of location on the 13th day of October last; I did not say that I filed my declaratory statement with the county recorder on the 15th day of October, it is the 13th I guess; it is made out that way; I live in Butte city; I had been in the Highland mining district a good many times before the 13th day of October, 1898, I was there on the 14th of last October; I left on the 14th about nine o'clock in the morning; I posted my notice of location the day before about nine or ten o'clock in the morning; when I posted it Mr. Roberson was with me; I posted it on a tree in a box; at the time I posted my notice, I saw another notice of location posted there; the name of John T. Lewis was signed to the other notice; I posted my notice about a foot from it; the name of the Lewis location was the "Keyno" my location was the Keynote; I said I posted my notice of location about nine o'clock in the morning of the 13th, and when I posted it the other one was there; after nine o'clock that day, I finished digging the hole and putting up the corners; when I posted my notice the hole lacked probably a foot of being done; it lacked about a foot of being
15 finished after I posted my notice only about twelve inches of the hole was dug, something in that neighborhood; as a matter of fact we only dug about a foot of the hole after posting the notice; I posted the notice about nine o'clock in the morning, and we left the premises about four o'clock in the evening; after nine o'clock we dug probably a foot in the hole; that is all we dug after we posted the notice; we had put the hole down close to ten feet before we posted the notice, and then after we posted the notice we put it down about a foot further so as to make it eleven feet deep; I know a man named Roberson. The notice that I posted on this claim on the 13th day of last October is there now; it was there last week when I was out there; I saw it at that time; the same one is there that I posted; it did not look exactly like the same one, someone had rubbed my name out; Roberson's initials are A. J. Roberson's name was written on that location notice under mine after my name was scratched out; that is mine was scratched out from over his; Roberson's name was not on that notice until he got the hole finished; the notice was written with a pencil; Mr. Roberson is here in the room now; I just know John T. Lewis by sight, that is all; I saw him the day I posted my notice; I don't know

whether he was working on the same premises down below a little or not; I did not see him working there was one other man there with him, I don't know who he was; I don't know whether
16 his name was Kelly or not, I never seen him before; Mr. Lewis come up to where we were nailing up the notice and had a conversation with me; he called my attention to the fact that there was another notice on that same tree that had been posted prior to that time; since the suit was commenced, or before, I have not sold any interest in this mining claim; I have sold nothing; I know Mr. Leyden; I have not sold an interest to him; I have given away an interest; I gave an interest to Mr. Leyden,—Andrew Leyden; he is one of the witnesses for the plaintiff; I have given away another interest; I gave an interest to Mr. Healy, he has got an interest for fighting it I have not given any interest to anyone else; I believe these deeds are on record; I was living in Butte, on the 13th day of last October; I located that claim for no one but myself; no one asked me to go out and locate it; I was on that claim two years ago; I was on to the layout two years ago; the layout I mean; is that it was not located properly or legally; I thought I would jump it; of course I had arrangements made to go out there and locate it; I had arrangements with Mr. Healy and Mr. Leyden; it was understood before I went out there that I would go and locate it; Mr. Healy was to fight the law suit in my name; I knew who was in possession of it; and who claimed it I knew the Butte City Water Company claimed it; I knew the water company had possession of it; the
17 name of A. J. Roberson was not put on that location notice until he got out of the hole, and when he got out of the hole he wrote his name on it; A. J. Roberson wrote his name after he got out of the hole; and then we left the premises; I do not claim that somebody recently wrote Roberson's name on the notice; I claim that my name was rubbed out from over his; the two names were on the notice when we left the premises—A. J. Roberson and Ben Baker; Roberson signed his name as a witness; his name is not above the words, "locators and claimants," it is below it; his name is not written directly over mine; it is under mine I began to dig the discovery shaft the day before I posted my notice; I went there about nine o'clock in the morning, and I worked that day, I and Mr. Roberson; and about nine o'clock the next morning I posted the notice; I wrote my name on the notice and he wrote his name on it after he got out of the hole; I requested him to write his name there; I requested him to write it under mine; we staked off the claim on the 13th; we staked it after we finished our hole; we had no tape line nor any other instrument to measure the distance it was stepped off; I stepped it; the ground is hilly and rocky there; one side is rocky and the other side is level; there is some timber there; I know how far fifteen hundred feet is; it is over a quarter of a mile; you can come within a few feet of fifteen hundred
18 feet by stepping it off over such ground as that—over rocks and through woods; I have never measured the distance; I

think the distance from my discovery on each side in length is over seven hundred feet; yet I have never measured it; I am acquainted with what is known as the Balarat tunnel in that neighborhood; I know where the discovery shaft of John T. Lewis is driven; it is about fifty feet below mine—fifty or seventy-five feet; it was there at the time I dug my discovery. I saw it there at that time; it is about fifty or seventy-five feet southeast of my shaft; I noticed an excavation there near where I sunk my discovery; my discovery is right on the northeast edge of that excavation; the excavation is somewhere in the neighborhood of thirty or forty feet long; some places it is about forty feet, some places it is not over thirty; the excavation is not square, it was dug up the hill and the water has worn it out, I suppose for about thirty feet wide, I should judge; that was there when I drove my discovery; this tree upon which I posted my notice is about twenty feet from my discovery hole; it would be in a northwesterly direction, or northeast rather; Mr. Roberson assisted me in putting up the corners; no one else assisted me; we began at the southwest corner that is corner No. 1; Mr. Roberson did the stepping; I did not count my steps I was following him right up; as to the distance I am testifying to what he told me.

19 At this time the defendant moves to strike out that part of the witnesses' testimony with reference to the distance.

Motion to strike sustained and that part of the witness' testimony as to the distance is by the court ordered stricken out.

The WITNESS: Mr. Roberson lives in Butte city; I know where he lived at that time; he lived on lower Washington street Butte city; you understood me to say that one corner of the claim had been moved; it was the northwest corner that was moved; I was out there last on the 13th of this month; that is the first time I visited the claim since the 14th of last October, when I left there after locating the claim; there was some timber along on that mountain at the time I made this location, some scattering timber; the surveyor has been out there and some of the timber is chopped out so that you can see from one post to another; the surveyor chopped the timber out so that you can look through, it looks to me as if there was a job of some kind put up there; I don't know the man's name who chopped the timber out; I know he was a deputy United States mineral surveyor; it might have been necessary to chop out the trees at that particular point in order to run a line through; before that chopping was done you could see there for two or three hundred yards, you could look back and see our dump; we could not see our stake, but we could see in the neighbor-

20 hood of where it was; you could not see the whole distance from corner No. 1 to corner No. 4; it is not a fact that accounts for my discovery being outside of my line; I am sure of that; we could make no mistake of that kind; it is not a fact that John T. Lewis and a man working with him come around and seen

these posts the day we put them up; there was no one else there on the ground but ourselves; they were there the day before; I only seen them that day when we went down to get water; they were not there that day at all; when we went past there in the morning; there was nobody there, and we left at four o'clock and still there was nobody there; I am sure that when Mr. Roberson and me put up that northwest corner that Mr. Lewis did not come up and have a conversation with us; I mean to say that the northwest corner has been moved; it is not a fact that my claim is the same width at both ends the way it is staked out now; when we put up the stakes we tried to put them up the natural width at both ends; we did not make one end of the claim two or three hundred feet wider than the other; it is not possible that we done that; I have not measured the distance between these corners (indicating), they were trees in place I do not think the width of my claim is the same at both ends as it was when we staked it; I know it is not; I know it has been moved in some two hundred feet; the way they stand now. one end is not the same
21 width as the other; the south end is the widest; the south end is about two hundred feet the widest; that is my guess at it; Mr. Roberson is here to-day; he has no interest in this case; when I went out there two or three days ago I did not notice that the trees had been cut out until I went up on the hill and come back, but I did notice it that day that I went out; it is not a fact that when I saw that line run, that it was then I come to the conclusion that one of the stakes had been moved; I went hunting for that corner and I could not find it, and someone says, Here is the corner away down here, I went down on the old ditch there looking for the corner where I put it, but I could not find it, that corner did not show any signs of being newly made; it did not look as if there was fresh dirt put around it, but the corner did not look the same as I put it, the dirt did not look the same as I put around it; as a matter of fact, there is not appearance whatever of that stake being newly put there, but it might have been moved last fall some time; I did not see it moved; it is not possible that I could be mistaken about the corner being moved; I ain't mistaken, of that I am sure; the reason I could not be mistaken is, that we dug a circle clear around our post and that post has only got a circle half way around it we dug a circle clear around our post and that one has only
22 got half a circle dug around it; we dug a circle clear around all of our posts but this post has only got a circle half way around. When I went out looking for that stake, I could not find it; I could not find it until someone said, Here is one stake up here; it has been moved is the only reason I could not find it; there was no trees there where I set that post so that I could tell exactly where I set it, there was only one small brush; I know it has been moved because I cut a tree down there near where the corner is now for that corner; and carried it a hundred yards, or such a matter; I went to where I cut that tree down; I then went about a hundred

yards, and could see no signs of a corner, or where any had been; I know it has been moved because I put it about a hundred yards from where I cut the tree down; I went where I cut this tree down and then went a hundred yards, and the stake was not there, and I did not find any trace of where it had been; all signs of where the stake had been could be obliterated, there is brush and bushes clear along there; it is a fact that these scrub bushes are very thick in some places; I did not cut any brush down where the corner was put up; it was just kind of brushy ground; and I could not find the stake; when I made the statement that I carried this stake about a hundred yards from the place where I cut it down to where I set it up, I guessed at it, or it was the best of my judgment, I did not step it off, but I know it is quite a ways, it is in
23 the neighborhood of a hundred yards; I did not measure it with a tape line or count my steps; it is not possible that I am mistaken as to the distance I carried that tree; the stake as it stands now is within a few feet of where I cut the tree down, it is within a few feet of the stump of the tree that I cut; it stands now about twenty feet of where I cut the tree down; I went to where I cut the tree down and walked in the direction of where I thought it was and did not find this stake where it now stands, I suppose that was the place, it looked to me like the place; where this stake now stands is about 20 feet from where I cut that stake, it looked to me like the place; that is my judgment; the stake stands to-day closer to where I cut the tree than from you to the wall; it might stand from the tree about the same distance as you are from the wall, I did not measure it; that is my best judgment; I saw the stake last week; I did not step it off, I did not think of it, I don't say it is over 20 feet, I did not measure it, I could not tell you; my judgment about distance is pretty fair; I did not say it is about twenty feet from where you are to the wall, I did not say anything of the kind; that is about 12 feet I would judge; it is not about the same distance from the place where I cut the tree as it is from you to the wall, it is about twenty feet; I did not say it was about the same distance as it was from you to the wall, I said it was
24 about twenty feet; the stump of that tree is not about the same distance as it is from you to the wall, I said it was about twenty feet; it is farther than from you to the wall; I did not go to the stump of that tree in order to get a start and did not find that corner; I did not testify a while ago that I went to the stump of that tree first to look for the corner where I thought it was and someone hollered to me that it was down there, I did not expect to find the corner away down there; I did not testify a while ago, that in my search for that corner, that I first went to where I cut the tree down, or from where I obtained the stake, and that I then walked about a hundred yards in the direction which I had placed the stake, and then looked for it expecting to find it there; the trees are all over that ground,—scattered trees,—just some places, it is pretty bushy some places and some places there isn't any; the reason why I

carried the stake that far was, that there was nothing there—not enough to make a stake out of; I am sure there is not any trees in the vicinity of where I set the stake—not large enough to make a stake; I said the stake had been moved about two hundred feet; I mean to say that there is no trees big enough to make a stake a hundred yards from where the stake is now; I want to be understood as testifying that way. We come out from No. three and I struck this tree and I stopped there and cut it down, and Mr.
25 Roberson went on and dug the hole and I carried the tree out and put it up.

Q. What was your object in making this location Mr. Baker?

Objected to for the reason that the object for locating the claim is immaterial.

Objection overruled.

Q. Now Mr. Baker you may state what your object was in locating that claim?

A. For mineral.

The WITNESS: I have never done any work there since the 14th day of last October, but I expect to; I stated that I had been on to the layout for about two years when I made that statement I did not mean that I knew the water company had bought it from John T. Lewis, and that I thought that his location did not fill the requirements, I did not know who owned it or how they got it; I did not testify about twenty minutes ago that I knew the water company owned it at that time; I did not know that that claim was owned and in the possession of the Butte City Water Company and its agents on the 13th day of October; I did not know it until Mr. Lewis told me that he had sold it to the water company; but I knew that it was not properly located, that is what I knew; I knew it was not properly located because you could not trace the corners, they were not marked.

26 Q. You had a conversation with Mr. Healy and Mr. Andrew Leyden before you went out there to make that location, concerning it? Didn't you have an understanding among yourselves?

Objected to for the reason that it is not proper cross-examination.

By the COURT: The witness has already testified what his purpose was in locating the premises in question, and it seems to me entirely immaterial as to what person or persons he talked with concerning the location he was about to make before having made it; he has testified also, I believe, that since the date of the location he has given two certain persons an interest there, and it is useless to go into the matter further than to explain the reason for his object for making the location; I shall sustain the objection.

Exception.

Re-direct examination.

By J. E. HEALY:

The WITNESS: There had been no hole sunk there before I commenced to sink; it had never been touched; it is a fact that Mr. Roberson signed this notice of location as a witness and so marked it; the date of this Lewis location was the 16th day of July, 1896.

27 Q. Now, then as to the moving of the stake on this claim: Are you acquainted with the customs of miners in marking mining claims?

A. Yes sir.

Objected to as immaterial. Objection sustained. Exception.

The WITNESS: I know this northwest corner was moved because it was originally near a ditch; it was in the neighborhood of 20 or 25 feet from the ditch; at the present time it is two hundred feet from the ditch,—something like that.

Re-cross examination.

By Mr. ROOT:

I refer to the northwest corner when I say that one corner has been moved; I mean it is two hundred feet from the ditch now; when I put it up it was close to the ditch; I claim that it has been moved northeast about two hundred feet; the ditch is not northeast or east of where the stake is now; the ditch is northwest,—nearly west of the northwest corner; the ditch that I refer to is some old ditch down there; it does not take water which runs out of the mouth of Ballarat tunnel; I know where the Ballarat tunnel is; I don't know that there is some water running out of the mouth of it; that is not the ditch that I refer to; it is some old ditch that has been dug for several years; I am not testifying as to the distance of that corner from the Ballarat ditch.

28 A. J. ROBERSON, after being first duly sworn testified as follows, on the part of the plaintiff.

Direct examination.

By Mr. HEALY, Esq.:

The WITNESS: I reside down here at 423 South Washington; I know where the Keynote quartz lode mining claim is; I am a prospector, I have been prospecting since '77; I know where the Keynote quartz lode is located; I know where the notice of location was posted on a tree; I remember that my name was signed to the

notice of location. My name was signed to that notice as a witness; Ben Baker's name was also signed to the notice; I know how the corners were put up on this claim; I helped Baker put them up; I stepped the distance between the corners; I heard part of Mr. Baker's evidence as to the stake at the northwest corner; I was out there last on the 13th of July; I think it was on the 13th of July; at that time I saw the situation of the northwest corner; that northwest corner is not in the place where it was originally set; it was originally placed about two hundred feet from where it is *not*—about two hundred or a hundred and fifty feet; I know that because I helped him to put it up; I know by the surface indications that it has been changed; we had a ditch dug all around it and a mound; the present stake has only got half a circle around it and there is some old pieces of stump laid around
29 it; there ain't no dirt around it only just right around the stake; the circle was all around the stake as originally placed, we just took and dug the dirt and scraped it up any way we could and throwed it around; I know the corner has been changed *to* because Mr. Baker cut a tree and packed it down; he packed it down through the brush and put it up there; I know the corner has been changed because where the stake is now is only about 20 feet from where he cut the tree, and he packed the tree about one hundred and fifty or two hundred feet when we set up the stake, there is an old ditch right close to where we set the stake first, I can't say how far it is; I did not measure it or step it off, but it is quite close.

Cross-examination.

By Mr. ROOT, Esq.:

The WITNESS: I said the stake was moved about two hundred or one hundred and fifty feet—between that you know; it is just scrubby timber down there where we set that corner; I did not find where the corner originally was because I did not look where it was; we set that corner there about nine months ago; I was there last fall in November, but I did not go up to the claim; I did not go around the corners at all until this last time; the corner was up about nine months since I was there; from the 13th or 14th day of October until the 13th day of July, it is somewheres around
30 nine months; I could not be mistaken about the corner being moved; I never saw anyone move that stake; I did not go back last week with Mr. Baker at all; I seen him going past where I was and I went up with him; I am camped over there; he wanted me to go up there with him and I went up there; I did not look for the place where the stake had been because it was getting late and they said let's go home; they had to drive in that night and it was getting towards dark; it was not quite sun down yet; I estimate the distance from where it was originally distance from the fact that where it is now it is in a nice open place and we put it in the brush;

we just made a hole for the stake and stuck it down and then made a mound around it; I could not say just how big the mound was; we throwed it up about a foot and a half or two feet high and we took a shovel handle and measured it across and it was about four feet across; and I did not look any for the stake where we placed it; I just remember by going back in nine months after, that it has been moved about a hundred and fifty or two hundred feet; I think the length of this room is probably forty feet; it is over three hundred feet from here to the livery stable there on the corner; it is just about that; it is all right how I estimated the distance; I did not count the lots, I don't know how many lots there is between here and there; I was not looking at the number of lots; it would
31 be about three hundred feet to there the way you could walk from here to there; it would be about three hundred feet to there the way you could walk from here to there; if you would go out in front and then walk down it would be about that; I helped Mr. Baker to put up the corners and drive the discovery shaft on this claim; it was on the 13th of October that we put the notice up; it was along about nine o'clock in the day; it may have been earlier than nine o'clock; it was in the forenoon I don't know just how much of the discovery there was to finish when we posted the notice I finished it up; I could not tell how much I done after the notice was posted because I did not measure it; I think I dug more than a foot after the notice was posted; we finished it up after we put the notice up; we dug it eleven feet deep on the lower side; we had no tape line, but we measured it, we had no rule, but we measured it like that with our hands (indicating) on a stick—on a pole; the pole was over eleven feet long; we took the pole and put our hands on it like that (indicating), and measured off eleven feet; we measured it with our hands like that (indicating), that is over a foot; we measured eleven feet off on the pole and put the hole down eleven feet on the lower side; both of us measured it; when we measured it we both come out just the same—my hands are a little larger than his; that is the only way we measured it; my hands put together that way
32 (indicating), they are over a foot; it is over twelve inches, but I just counted it twelve inches with my hands that way (indicating); we started to dig this shaft before we put the notice up; I would not say how much was dug after we put the notice up; I did not measure how deep we did dig after we put the notice up.

Re-direct examination.

By J. E. HEALY:

Q. Mr. Roberson, will you please put your hands on that paper?

(Witness places his hands as heretofore indicated on paper.)

By the WITNESS: That is what we called a foot; that is the way we done it.

Plaintiff asks to have paper marked for identification so as to show the size of the hands and to show the measurement used in ascertaining the depth of this discovery shaft.

Paper marked for identification.

Plaintiff rests.

Defendant's Testimony.

The defendant at this time moved the court for a non-suit and asks that the plaintiff's case be dismissed, for the following reasons:

Because the plaintiff has wholly failed to make out a case; because he has failed to show valid location of a mining claim on the premises in question; because the allegations of his com-
33 plaint are not proven; and because it appears from the testimony introduced by the plaintiff, that he has not complied with section 3611 of the Political Code of the State of Montana, and section 3615 of the same code in this; that he has not, after the posting of his notice and within ninety days, sunk a discovery shaft upon the lode or claim to the depth of at least ten feet from the lowest part of the rim of said shaft at the surface, nor did he do that equivalent of work in a cut, crosscut or tunnel, which cuts a lode at the depth of ten feet below the surface; nor an open cut at least ten feet in length along the lode from the point where the lode was discovered.

By the COURT: It seems to me that the objection is altogether technical, and I will overrule it.

Exception.

JOHN T. LEWIS, after being first duly sworn, on the part of the defendant, testified as follows:

Direct examination.

By Mr. ROOT:

The WITNESS: My name is John T. Lewis; I live in Highland, Silver Bow county, this State; I think I have lived there nine years now; I am a citizen of the United States just now; I am not acquainted with Mr. Baker, the plaintiff in this case; I expect I have seen him before; I think I saw him one day for about
34 a minute, but I did not know him afterwards; I went up to him one day when they were up there on the ground you know; I think that was on the 12th day of October, if I remember right; that was last fall—last year; there was another man with him I think; this fellow what they call Roberson, ain't it? I think he is the same man who testified a while ago; I did not stay long enough to know them; they were starting a little hole there when I went up there, and I went up there to see what they were doing, and I asked them if they know they were on other folks' ground,

and they said "Who" and I said the water company; that is about all the transactions we had; I never saw a corner that they put up there until the surveyor come there the other day, except one below the mouth of the tunnel, I saw one there; I did not know where they were, and I never saw any except that one until the other day and then I went and found two that day; I did not know where they were at that time; I never saw them until I found them that day; I was working right there in the tunnel for two months last fall; I was about five or six hundred feet from where they were working; I saw them digging the shaft there and I went up there; they were just starting a little hole; I was not up there the next day; I never was there again until nearly a month afterwards; I saw them working there, and the man working with him, I asked them to go up and let us see
35 what they were doing, and when we got up there they had a little hole sunk and a notice on a tree; then after that I never went over there until I went up there with the surveyor; they were sinking a little hole, I don't know how long it was, I did not measure it; I don't know how deep it was, I could not tell, I did not measure it, but they went down pretty deep, may be five or six feet, I don't know how deep it was for I never measured it; I did not examine it any more than to look in; my occupation has been mining most of the time; I have been a miner since '66, more or less, I think I know a ledge or vein if I saw one; I have worked some around quartz; I think I know a vein, I think I know a vein; I have worked considerably on quartz in this country; I did not see any vein in this hole that these men were sinking that day when I went over to where they were working, I did not see any sign whatever; I was out there with the surveyor a few days ago; they wanted me to show him the boundaries that he put up; I made a location of the Keyno right there; I put the notice up July 6th, 1896, and I am pretty near sure that I done the work required to be done and had it recorded; I think this notice which you hand me is the same one that I had recorded; I think that is my hand writing there (indicating); Arthur Clark drawed it up for me,—he was a notary public, and I got him to fix it for me; that was
36 Arthur B. Clark, he was a notary public at the time, I don't know whether he is now or not; I think this deed which you hand me is the deed I gave to the water company; that is my signature to that deed; it is pretty hard for me to see if I don't have my glasses with me.

Notice of location and deed above referred to offered in evidence by the defendant, which said notice of location is in words and figures as follows:

"*Notice of Location—Lode Claim.*

Notice is hereby given that the undersigned who is a citizen of the United States (or ha- declared — intention to become such) and is of lawful age has on this 6th day of July, A. D., 1896, located a mining claim to be known as the Keyno mine; situated on the north slope of the Ballarat hill in Highland mining district (t— r—) Silver Bow county, State of Montana.

"A vein or lode of quartz, or other rock in place (having at least one well defined wall) bearing gold and other metals, has been discovered, and the location has been made in compliance with the provisions of the statutes of the United States, the laws of the State of Montana, and with the regulations and local customs of miners.

This claim is for 150 linear feet of the said vein or lode, extending 750 feet in an easterly direction and 750 feet in a westerly direction from the discovery shaft or pit (where a notice of said
37 location is posted) and for surface ground 600 feet in width, including three hundred feet on the north side and 300 feet on the south side of the center of said vein or lode, at the surface.

"The claims adjoining the above named premises are—

"The corners of the said claim are so distinctly marked upon the ground that its boundaries can be readily traced, such corners and boundaries being more particularly described as follows, to wit:

"Beginning at post No. 1, the northwest corner a post marked No. 1 situated about forty feet easterly from the old Ballarat mill, thence 1500 feet easterly to post marked No. 2 the northeast corner, thence 600 feet southerly to post No. 3, a blazed tree marked No. 3, the southwest corner, thence westerly 1500 feet to the southwest corner a blazed tree marked No. 4 thence northerly 600 feet to post No. 1, the place of beginning.

JOHN T. LEWIS,
Locator or Claimant.

(Duly verified.)

The said deed was one conveying the said "Keynote" quartz lode claim from the locator Lewis to the defendant.

Plaintiff objects to the introduction in evidence of the so-called declaratory statement of the Keyno Lode claim, for the following reasons:

First. That it does not comply with section 3611 of the Political Code in this: that it fails to show that a well defined crevice
38 of valuable deposits has been discovered; and that it shows that one well defined wall has been discovered.

Second. That it does not comply with section 3612 of the Political Code, in this; under subdivision 4 of said section, in failing to state the general course of the work as near as may be; under subdivision 6 of said section, in failing totally to describe the discovery shaft, or its equivalent, or the discovery work done upon the claim;

under subdivision 7 of said section, in failing to properly describe the corners or the markings thereon; in describing a blazed tree; and not a blazed tree in place; in describing the same corner as a post and as a blazed tree; in failing to state that the post was the size or character required by law, or that they were of the lawful size; in failing to state that the posts were surrounded by monuments of stone or earth as by law required; in failing to give such a description of the markings of each corner as would identify the said corners. That this declaratory statement is not verified as required by section 3612 of the Political Code, in this respect; that it is not verified as to what the size, character or dimensions of the discovery work was; that it is not verified in so far as describing the corners is concerned.

Objection not passed upon at this time.

39 The WITNESS: I would not swear how deep this discovery that I seen Mr. Baker and Mr. Roberson digging was when I went back a month afterwards; it might have been somewhere in the neighborhood of five or six feet, I would judge by just looking at it, I didn't measure nothing. I could not be very correct about the length of that table by looking at it; I should think by looking at it, that it is pretty close to six feet; my best judgment is that their discovery was not ten feet deep on the lower side, as I understand the law requires, but on the back side, of course it is that, the front side is the lowest rim of the shaft; it don't look as deep as mine; my best judgment would be that I don't think it will go ten feet; that gentleman sitting over there is the surveyor I speak of—Mr. McDonald; I was there when he made the survey last week or a few days ago, while he was there we saw two corners of Mr. Baker's Keynote claim; him and I was coming down from the upper end where we had been surveying, and we were coming down towards the discovery and we come across the southwest corner, and that evening he found the northwest corner; I was not with him when he found that; I was not there when he found that.

M. L. McDONALD, after being first duly sworn, testified as follows on the part of the defendant:

Direct examination.

By Mr. ROOT:

40 The WITNESS: My name is M. L. McDonald; I am a member of the firm of Harper & McDonald; I am an engineer and surveyor; I am a member of the Montana Association of Engineers; I have a college degree as a civil engineer but not as a mining engineer; am acquainted with Mr. Eugene Carroll, superintendent of the water works; I am acquainted with Mr. John T. Lewis, that old gentleman; I went to Highland a few days ago and did some surveying for the water company; I surveyed the Keyno and

Keynote claims; I made a map and kept a record; that map which you show me is the map I made from the survey I made; I marked that point on the map in red ink; that is marked "S. W. corner Keynote;" that was a pine stump at that corner, about six inches in diameter, and I should say it was set up above the ground about six feet; there was markings on that stump; it was marked "Southwest corner Keynote Lode claim, loc. 13 day of October 1898;" that is the corner which I marked on the map in red ink; I seen the northwest corner which I have marked on the map in red ink. That was marked post No. 4, or corner of the Keynote Lode claim, loc. Oct. 13, 1898; also had "Post No. 4, northwest corner—northwest corner was spelled out the same as the southwest, of the Keynote Lode claim, located by Ben Baker; I run a line between these two points referred to—the southwest and northwest corners; had the map made.

Map offered in evidence by the defendant.

41 Admitted without objection, and marked Defendant's Exhibit "A."

The WITNESS: North of the discovery shaft, there is a gulch running down in a northerly direction, which passes close to the northeast corner of the Keynote, which I have indicated in the map by an irregular line, representing a stream of water; the water comes from the tunnel; it is marked tunnel on the map; I first made the survey of the Keyno lode, setting the southeast and southwest corners; and then I went down the hill from the south end of the Keyno, and found the post which is shown here as the southwest corner of the Keynote; the post set about six feet high, and is about eight inches in diameter, I took a line through the center of the claim from the discovery to the south end, where I found this corner, and I surveyed out from a point on my line that I had run through the center; and on running a line from the discovery in a northerly direction to the north end, I passed just east of the northwest corner; there I found a post, and the markings on that post,—the handwriting was identical with the one that I found at the southwest corner, and it was written out just the same way; and then when I found that post, I compared that object with the center line I had run through; that evening I stayed at Mr. Lewis' cabin, and it occurred to me

42 that the southwest and northwest corners of the Keynote claim did not cover the discovery and then I computed a line from the northwest to the southwest corner; and I decided the next morning that I would run that line, so I started from the northwest corner and run the line and I found that my computation was correct that I had made the night before; I found that the discovery shaft was thirty-four feet outside the line running from the southwest to the northwest corner; I found that that line leaves the discovery of the Keynote outside the claim, thirty-four feet; I noticed on a tree—nailed on a tree, the location notice of the Keynote—Mr. Baker's claim; the red line on the map represents the line that I

run from the northwest to the southwest corner; that is the line I run between those two corners; Mr. Baker's discovery is situated thirty-four feet in a southwesterly direction from that line,—about the center of it; it is indicated by a square there on the map in red, it is also marked "Discovery" of the Keynote;" when I was up at this northwest corner, there were no indications whatever or any appearance of a newly made mound; it did not appear to me that that post had been placed there recently; the mounds around the two posts resembled each other very closely; the southwest corner is a stump and there is earth thrown around each one of them and they correspond very much; I saw a tree close to Mr. Baker's discovery, I
43 thought it was about twenty inches in diameter; Mr. Baker's notice of location was posted on the east side of that tree; the tree is about 13 feet in a northwesterly direction from the discovery shaft, and it is indicated on the map and marked "Tree;" when I was there, I found the northeast corner of the Keynote Mr. Baker's location; it appears on the map; it is marked "N" E cor. Keynote" in red ink; it is marked that way on the map; it is an eight by eight post; I think that post has been used in an old mill there; it had been hewed square and it was above the ground four feet probably, and there was a mound of earth and stone around it, and it was marked post No. 3, northeast corner—northeast was spelled out—Keynote Lode claim, "Loc. 13 day of October, 1896; the handwriting was identical with the southwest and northwest corners; I found those three corners, the southwest, northwest and northeast; they appear correctly upon that map; that map has a scale; the scale is one hundred feet to the inch; the distance from the northwest to the northeast corner is three hundred and forty-four feet, and the distance from the northwest to the southwest corner is seven hundred and forty-three feet; I did not find the southeast corner of Mr. Baker's claim; those dotted red lines represent a parallelogram, representing Mr. Baker's claim; I just assumed that the claim
44 was in the shape of a parallelogram—the same width at each end and the same length on both sides, and those dotted lines represent the location, and that would be the location of the southeast corner (indicating); that is the corner I did not find, but these three corners (indicating); I did find; Mr. Lewis and Roland E. Hall, an assistant was with me while doing the surveying there; Mr. Hall is the one who discovered the northwest corner; there was no clearing down between these two points (indicating); until I cleared it out; we could not see from one post to the other until after the trees were cut; the principal reason for the cutting out the trees was to verify my computations of the night before, whether the discovery of the Keynote was outside the line from the northwest to the southwest corner; no one suggested to me that the discovery was outside the line from the northwest to the southwest corner; as I said before, I found the southwest corner and then I found the northwest and as you are going down to the cabin, you can see up the hill, and it looked to me as if that southwest corner

was too far east; that is the way it occurred to me that the discovery is outside the line between the two corners; I thought a line drawn between these two posts would leave the discovery outside the location, but still I could not tell for certain until I made the survey; the character of the ground between these two points is rather steep, it is on
the angle of probably twenty degrees, and then there was
45 scattered trees between these two points, some of the trees probably eight inches through and then some smaller, and there is down timber, but you can walk over them all right; near the northwest corner I saw the stump of a tree; there was a tree laying there and a piece had been cut out of it; the stump of the tree is about 20 or 30 feet from the northwest corner; there is trees scattered all around that country, I did not go around the exterior boundaries of this claim, I surveyed from the center of it; that is the Lewis ground I mean; I found all the corners after they were pointed out to me; I was at each corner of the claim; I learned that this shaft that is outside the line drawn between the northwest and southwest corners of the Keynote, was Baker's discovery by Mr. Lewis pointing it out to me; that is John T. Lewis; that old gentleman there; he pointed it out to me; I have marked on that map, the word "Excavation" with some lines around it; Mr. Baker's discovery is only two or three feet north of that excavation; I heard Mr. Baker's testimony; I heard him testify that his shaft was only a short distance from the edge of that excavation; and that is the shaft I have marked there on the map in red.

At the northeast corner of the Keynote claim, the Lewis ground is a pine stump, about six inches square, and it stands four feet above
the ground and it is marked "Keyno" "Post No. 1, and it
46 stands eighteen and a half feet from the green coloring on the map, and it is marked Loc. cor.; that is a post about six inches square and stands about four feet out of the ground and it is marked Keyno post No. 1 northwest corner" it is at the north west corner on the green line—the green shading; it was a pine tree about ten inches in diameter; while I was out there I cut it off and squared it up and marked it again where it had been hewed off; the pitch had run down over the pencil marks, and all that we could see was the figure 4 and the K; I could not make out the "eno;" there was a K and a 4 on the tree that we could make out; the southwest corner, which is one hundred and twenty feet southeast of the southwest corner of the green shading, is a pine tree eight inches in diameter and written on it is "Keyno No. 3; that is hewed off on the northeast side of the post; the southeast corner, which is thirty nine and a half feet east of the southeast corner of the green shading, and marked "Loc. cor." is the position of the southeast corner of the Keyno; that is a pine stump and is about five inches in diameter, and stands about four or five feet high, and it is marked "Keyno post No. 2" these posts were all pointed out to me by Mr. Lewis; he also pointed out to me his discovery; the Keyno or Lewis discovery, there was snow in that shaft at that time, and I meas-

ured down to the top of a pole that was there below the snow,
47 and it measured eight and a half feet to that point on the pole, or to the top of the snow, and then I pulled this pole out of the snow—this pole had been there I suppose since last summer, or sometime before the snow fell anyway—and I pulled the pole out of the snow and measured the distance below the snow, and that measured three feet; that made eleven feet and a half from the lowest point on the rim to the bottom; Lewis' discovery was that deep—eleven feet and a half; I examined the other discovery, the Baker discovery, that shaft is about three by six feet on top and at that time, at the lowest point, on the down hill side—it was six feet deep, and at the upper side ten feet; this ground slopes four feet in that distance; that is, it is six feet in this side (indicating), and at this side, (indicating) it is ten feet deep; Mr. Roland Hall assisted me.

I am a mining engineer as well as a deputy United States surveyor; the experience I have had in mining is what I have had during the last eleven years I have surveyed nearly all the mining properties in Butte and this part of Montana; I think I know a vein or lode when I see it; as I say, I could not get into the bottom of Mr. Lewis' discovery and I don't know what there was in that; that was filled with snow and I could not tell; Mr. Baker's discovery, the one marked in red, there was earth in that hole; I did not see any vein or lode disclosed there; I examined it for that pur-
48 pose; I looked at the sides and I seen some boulders there, but I did not see any rock in place; that shaft is six feet at the lower side and ten feet at the upper side in depth.

At this time the plaintiff further objects to the introduction of the so-called declaratory statement, for the following reasons:

That the description of the claim as shown by the map which has been introduced in evidence is altogether misleading and is in effect no description at all, for the reason that the evidence given here by the surveyor, is that post No. one is the northeast corner; while the declaratory statement shows that it is the northwest corner; and that starting from this initial—post No. 1—the northwest corner; the declaratory statement described a claim, which would be in effect laid across the claim as shown by the map; that is to say, that this claim as it now lays would be turned around and would lay directly across it:

That this description shows, that in a northerly direction from the post No. 1, all that would be included under this declaratory statement would be six hundred feet, and that the location as shown on the ground, shows fifteen hundred feet: That there is no evidence to show that corners at a distance of six hundred have been marked.

Adjourned until 10 o'clock to-morrow, July 20th 1899.

JULY 20TH, 1899—10 o'clock a. m.

49 At this time the plaintiff further objects to the introduction of the notice of location or declaratory statement in evidence for the reason, that the proof offered by the defendant shows that a stump was made for a corner, and that a post is described in the declaratory statement, and that between the two there is a variance.

By the COURT: The location notice offered in evidence is not in certain particulars in accordance with the present statute requirements: The defendant cannot claim title to the premises in controversy after having located the Keyno in the manner indicated by the notice of location or declaratory statement, which it is required shall be filed with the county clerk and must contain certain verified statements, and as the notice sought to be introduced is lacking, the court will sustain the objection to its introduction.

It may be that, if prior to the commencement of this trial, an amended declaratory statement showing the facts necessary, was made and filed in the office of the recorder, such amended statement might have been offered in evidence; that is merely a suggestion however.

Defendant excepts to the ruling of the court in sustaining the objection to the introduction of the declaratory statement referred to in evidence.

M. L. MCDONALD, after being recalled for further examina-
50 tion testified as follows on the part of the defendant.

Direct examination.

By Mr. ROOTE:

By the WITNESS: There is no evidence at the northwest corner of its being newly made—of the mound being newly made; the southwest corner and the northwest corner resemble each other very much—the mounds resemble each other very much; I should say that the mound at the northwest corner was made about the same time as the mound at the southwest corner I did not change the post at the northwest corner; I heard before about it being changed.

Cross examination.

By Mr. HEALY:

The WITNESS: The mountain that the claims are located on slopes to the north at an angle of about 22 degrees; it is quite steep, but you can walk up it, it is not just exactly what you would call a steep mountain; the line that I run between the corners come on the east side of the post on the southwest corner; I run two lines there, one between the northwest and southwest corners and one through the center of the claim; I don't think it is knolly ground at the northwest corner, it goes down into a ravine and then comes up out

of the ravine again; the corner is a little beyond the
51 rise; I cut two lines through there; I don't think I could stand at the northwest corner and look through the trees and see the southwest corner before I cut the line through; I don't think I could see through until I cut that line through that left the discovery 34 feet outside of the line. I think I could see from one corner to the other after cutting the trees out; standing at the northwest corner as it now sets, just about on the brow of the knoll there, as you come up from the ravine from the dump, through the trees you could probably see the dump, I would not say for certain though; I hardly think you could see through those trees; if you saw it and everybody else saw it, any one could probably see it.

Re-direct examination.

By Mr. ROOTE:

The WITNESS: I don't think you could see through from the northwest corner to the southwest corner before that line was cut through to make the survey.

ROLAND HALL, after being first duly sworn, on the part of the defendant, testified as follows:

Direct examination.

By Mr. ROOTE:

The WITNESS: My full name is Roland Hall; I live in Butte city; I am the Roland Hall who is the assistant to Mr. McDonald the engineer; surveying is my business; I assisted Mr. McDonald
52 to make a survey of the premises in question—the Keynote quartz lode mining claim in the Highland mountain district a few days ago; that map which is before me and that is marked "Defendant's Exhibit A" is all right.

Q. I desire to call your attention to what is marked in red ink on the map—the northwest corner of the Keynote?

Objected to as being incompetent, irrelevant and immaterial for any purpose for the reason that the court has already ruled that no title whatever or right to the possession at this time remains in the defendant corporation as against the plaintiff and the defendant is a mere trespasser; and under the decisions, the plaintiff has the right to the possession; and that there can be no controversy as to the right of possession of this property, unless it can be shown that there is a superior right remaining in the defendant:

As I understand this case, the defendant has certainly been in the possession of the premises in controversy for about three years; and the plaintiff is seeking to recover from the defendant the possession of the premises in controversy, or to eject the defendant therefrom,

by reason of his having sometime during last fall, filed a notice of location of a lode designated as the Keynote; The possession of the defendant for that period of time is good, it seems to me, as against the plaintiff, if the defendant can show that no location was
53 made by the plaintiff, or in other words, no sufficient location of the premises in question was made by him, and the objection will be overruled.

Exception.

The WITNESS: I was at the northwest corner of the Keynote lode.

Q. Now, Mr. Hall, the northwest corner—corner No. 4 of the plaintiff's claim, that is marked in red on the map; I will ask you if you were there in company with Mr. McDonald in making the survey which you have testified concerning?

A. Yes, sir, I was at that corner.

The WITNESS: I was at the southwest corner of the Keynote which has been referred to as corner No. 1; the mounds of these two corners resembled each other very much; they looked to me about the same age; there was no evidence that I saw of the northwest corner being newly made.

Q. I will call your attention to the line between those two corners, and ask you to state to the jury whether or not, before the timber was cut out, you could see from one corner to another?

A. No sir, you could not.

The WITNESS: I was present when Mr. McDonald was surveying through between those two corners referred to; that line left Mr. Baker's discovery, on the outside I saw such discovery, it was
54 pointed out to me; it was pointed out by Mr. John T. Lewis that is the discovery indicated on the map in red as the discovery of the Keynote; I was at that point with Mr. McDonald; that line was on the west side of the Keynote; I was at the northeast corner of the Keynote; I was at all three corners, the southwest, the northwest and the northeast the mounds at all of these corners resemble each other very much; they all appear to be about the same.

Cross-examination.

By Mr. J. E. HEALY:

The WITNESS: I did not say that these corners were all pointed out to me by Mr. Lewis; the northwest corner I found myself; I said the discovery shaft was pointed out by Mr. Lewis.

Redirect examination.

By Mr. ROOTE:

The WITNESS: I did not touch any of these corners.

Q. Did you see a tree cut down near any of these corners?

Objected to for the reason that this has all been brought out.

Objection sustained.

Adjourned until 2 o'clock p. m. to-day.

Afternoon session.

ROLLIN HALL, after being re-called testified as follows:

55 Direct examination.

By Mr. ROOTE:

The WITNESS: I observed the ground for one hundred feet or two hundred feet around the northwest corner; there was quite a lot of timber all around there.

Q. I will ask you whether you observed whether any tree had been cut close to that northwest corner?

Objected to as being immaterial, incompetent and irrelevant, and for the further reason that it has been positively testified both by the plaintiff and by Mr. McDonald, on behalf of the defendant, that this tree, or some tree, was cut something like 20 or 30 feet from this point.

Objection sustained.

Exception.

Q. State whether or not there was any trees down about two hundred feet from this corner, down that way? (Indicating.)

A. Yes, sir, trees all around there.

Cross-examination.

By Mr. J. E. HEALY:

Q. What kind of trees?

A. Pine trees,

JOHN T. LEWIS, after being recalled, testified as follows on the part of the defendant.

Direct examination.

By Mr. ROOTE:

56 The WITNESS: I have seen all the corners of Mr. Baker's Keynote claim as they now stand, if they have not been moved since I have been there last Friday they are the corners shown upon this map as the red corners I did not read all that was written on the posts, but I noticed the numbers and the name; the names was Keynote, and the numbers was 1–2–3 and 4; they come pretty near my location when they call it the Keynote, mine is Keyno and theirs is the Keynote, I think it is.

Q. Now, then, you may state to the jury, Mr. Lewis, the appearance of those four corners, as to whether or not they are alike.

Objected to by the plaintiff for the reason, that this is incompetent for any purpose; that it is immaterial under the pleadings in this case.

By the COURT: It seems to me that this matter was passed upon this morning, and I have had no occasion to change the ruling made. I will say to you now that if the position of the court was misunderstood and in order that no misunderstanding may arise during the further progress of this case, I will say, that the position of the court is, that the party in possession of property cannot be ousted or dispossessed therefrom by one making a location of a mining claim in an invalid manner, and in so far as such location is concerned, if improperly made it is as though no location
57 whatever had been made; I have stated repeatedly what the court's opinion is upon the matter, and I don't care to again repeat the conclusion arrived at, namely: That if it be shown that the location in question is invalid by reason of the fact that the discovery shaft is without boundaries thereof, the same has no effect whatever as against the property in question.

Exception.

Q. You have stated that you have examined all four of these corners?

A. I saw them all I believe.

Plaintiff objects to what the witness believes.

Q. Now tell the jury, Mr. Lewis, whether the posts are all alike, or whether there is any difference in one from the other?

A. I don't know any difference, only that one post—that is No. 3, there is a number on that and then there is other writing besides.

By the WITNESS: The mounds were all about the same as near as I can judge. There was no difference in the appearance of the four corners as to age.

Q. Now, particularly with reference to the northwest corner, as compared with the others: Did that look to be the same age?

A. There was no sign of any difference; they all looked like the same age.

Q. Now I will call your attention to the two ends of Mr.
58 Baker's location, with reference to the width of this end (indicating), and this end (indicating), and ask you to state to the jury what your best judgment is as to the width of that end (indicating), of the claim corresponding with the width of this end (indicating) of the claim?

A. I think they are about the same.

Q. That is your best judgment is it.

A. Yes sir.

Cross examination.

By J. E. HEALY:

The WITNESS: I saw all four of these *concerns;* I went up there for the purpose of pointing out the corners to the surveyor; he asked me to go with him; I found all four corners; I found the

corner afterwards that he did not find before; I found that southeast corner that we did not see before; I went up there to show him my claim, but I found all four corners of the Keynote.

Redirect examination.

By Mr. ROOTE:

The WITNESS: I did not find all four corners before Mr. McDonald left; the last corner I found was the southeast corner; we did not find that corner before Mr. McDonald left; we hunted for it but we could not find it; I found that corner after he had left; the other three corners, he found this one (indicating) and him and me found
that one (indicating), coming down the hill; this one, right
59 at the mouth of the tunnel, nobody found it; we found corners Nos. 1–3 and four while Mr. McDonald was there, and I found No. 2 last Friday; I did not change any of Mr. Baker's corners.

F. H. MILES, after being first duly sworn, on the part of the defendant, testified as follows:

Direct examination.

By Mr. ROOTE:

The WITNESS: I live at the Butte Water Company's reservoir; I am acquainted in the Highland mining district; I know the Keynote quartz lode mining claim, the premises in dispute in this case; I know three of the corners of that claim; I have seen corners Nos. 1–3 and four, as shown on the map which is before me that is the southeast, northeast and northwest corners I saw the northwest corner last Friday; the mounds around all the corners looked to be the same; I was not there when Mr. McDonald was doing the surveying; I was there afterwards.

Q. I will ask you if you noticed as to the timber around on that claim?

—. ——.

Q. I will call your attention to the northwest corner, Mr. Miles, and I will ask you if you noticed any timber about two hundred feet southwest of that northwest corner?

A. Well, there is some timber. It is scattered all around
60 that corner; I noticed that there was timber down two hundred feet farther, down two hundred feet farther if they made the claim that much wider; there was timber enough there to make posts; the timber is all the way from scrubby timber to eight inches in diameter; I did not move any of these stakes at any time; I don't know of any one who did; yesterday was the first time I heard that it was claimed that they had been moved.

No cross examination.

S. H. NORTHEY, after being first duly sworn testified as follows:

Direct examination.

By Mr. ROOTE:

The WITNESS: I live in Centreville my business is mining; I am acquainted with the Keynote quartz lode mining claim, the premises in question in this case; I have seen three corners of that claim; I seen them on the 14th of this month; I seen the southwest, the northwest and the northeast corners of this claim, these corners here (indicating); the numbers of the corners that I seen is 1–3 and 4; I believe it was the 14th of the present month that I seen them, it was last Friday.

Q. I will ask you to state to the jury what was the conditions of the mound around these three corners with respect to age?

A. They looked alike.

61 Q. What is your best judgment as to them being of different or the same ages?

A. The best of my judgment is, that they are all of the same age.

No cross examination.

EUGENE CARROLL, after being first duly sworn, on the part of the defendant, testified as follows:

Direct examination.

By Mr. ROOTE:

The WITNESS: My name is Eugene Carroll; I am receiver of the water company; I was superintendent of the water company up to the time it went into the hands of a receiver; I was managing the business of the water company at the time this suit was brought.

Q. I will ask you to state, Mr. Carroll, whether you have, yourself, or by any of your agents changed any of the corners of Mr. Baker's Keynote quartz lode mining claim.

A. I have not myself changed any of the stakes or even seen any of the stakes, and I have never authorized any of my agents to change or touch the stakes; I did not know they were changed until the engineer told me when he come back from making the survey; I did not know anything about the condition of the matter until the engineer come back and told me about the discovery being off the Keynote claim.

62 The WITNESS: I first knew that the discovery shaft of the Keynote was outside the lines when Mr. McDonald came back from making the survey and told me; if I said that I did not know that the change in the stakes was made until such a time, I did not mean to say, it was a slip of the tongue; I mean to say that I did not know that the discovery shaft of the Keynote was off the claim until I was informed that it was by Mr. McDonald, who was

sent up there by the water company to make surveys; that is the first intimation I had that there was anything wrong. I have never been there myself, and I have never authorized anyone to go there and interfere with anything on the Keynote claim; I have never seen any of the corners; I have been on the Keynote claim I guess I have been up there several times since it was located, but I was never around the claim or on the upper end of the claim.

J. E. HEALY, after being first duly sworn, testified as follows, on the part of the defendant:

Direct examination.

By Mr. ROOTE:

The WITNESS: My name is James E. Healy; I am an attorney I am the attorney of record of the plaintiff in this case; I wrote the paper which you hand me; I served that paper on you; this is not the original; the original would perhaps be the best evidence,
63 but this is undoubtedly a copy of it; no doubt the original is among the papers filed in this case; you can look among the papers and find it: I think that is the original you now have.

This paper above referred to offered in evidence by the defendant. Admitted without objection and paper read to the jury, and is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT "B."

In the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow.

BEN BAKER, Plaintiff,
vs.
THE BUTTE CITY WATER COMPANY, Defendant.

To the above-named defendant and to Messrs. Wellcome and Roote its attorneys:

You and each of you will please take notice, that the plaintiff Ben Baker, intends, as soon as he can make arrangements therefor, to go to work upon the Keynote Lode mining claim, as in such manner for the development thereof, may be deemed advisable, and at this time, it is his intention, to work in the tunnel, usually called and termed the Ballarat tunnel, situate on his said Keynote
64 Lode mining claim, and that in doing such work in said tunnel he will not allow any interference with his said rights. If you have any intention of enjoining, or attempting to enjoin him, on account of any pretended lode location which you have on

said ground, or of interfering with his said rights therein or thereto, you will now take notice of said intention, herein set out.

Dated March 8th, 1898.

(Signed) BEN BAKER,
By J. E. HEALY,
Attorney for said Plaintiff.

Due service of the foregoing notice admitted and copy received this 8th day of March, 1899.

WELLCOME AND ROOTE,
Attorneys for Def't.

Filed March 8,

EUGENE CARROLL being recalled upon the part of the defendant testified as follows:

Direct examination.

By Mr. ROOTE:

The WITNESS: I am familiar with the tunnel on this claim that has been testified to by some of the witnesses; it is called the old Ballarat tunnel; there is a large spring of water somewhere in the hill and there is water comes out of the mouth of the tunnel; we make use of the water; the water was formerly used in Humbug gulch for placer mining; we bought the Ballarat water rights and built a flume running from the mouth of the tunnel and connected it with our Fish Creek flume and then it comes into the city and is used for city purposes: These water rights was bought in Humbug gulch—there was five or six residents owned it, and I bought it from them and then turned the water into the old Ballarat; we have been using that Fish Creek flume for four or five years.

Defendant rests.

Plaintiff's Testimony in Rebuttal.

WILLIAM SOWDEN after being first duly sworn, upon the part of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. J. E. HEALY:

Q. Mr. Sowden, I will ask you whether or not you know the Keynote quartz lode mining claim?

A. I do, yes sir.

Q. Did you see the discovery shaft on that claim?

A. Yes sir.

Q. You may state to the jury what is in that shaft with reference to lodes or veins or otherwise.

66 A. I should say there was one well defined wall.

Defendant objects to this testimony for the reason that it is not proper rebuttal, and should have been introduced in plaintiff's case in chief, if at all.

By the COURT: It seems to me that all testimony in regard to the location of the premises in question and with regard to the lode developed in the shaft sunk should have been introduced upon the plaintiff's case in the first instance. The objection will be sustained.

Exception.

Q. With reference to the southeast corner of the Keynote, I will ask you whether or not you found that corner?

A. I found all the corners.

Q. The whole four corners?

A. Yes sir.

Q. Did you know of anyone not finding them?

A. No sir.

No cross-examination.

Testimony closed.

And upon the closing of the testimony the case was argued to the jury by counsel for plaintiff and defendant and thereupon the court instructed the jury in ten instructions which ten instructions are as follows, to-wit:

67 (Title of Court and Cause.)

Instruction No. 1 given.

John Lindsay, judge.

The jury are instructed that this is an action brought by the plaintiff against the defendant to recover the possession of a certain tract of land, known as the "Keynote" Lode mining claim, the plaintiff alleging that on the 13th day of October 1898, he was possessed and was the owner and entitled to the possession, and was on the day of the filing of the complaint still entitled to the possession of the said lode mining claim; and that the defendant on or about the 17th day of October, 1898, without right or title, entered into the possession of said premises and ousted and ejected the plaintiff therefrom, and unlawfully withholds the possession thereof. The plaintiff bases his claim to possession under a mining location, and to entitle him to recover, he must show by a preponderance of the testimony that the mining location under which he claims was a valid and subsisting one at the time he claims to have been ousted by the defendant.

Instruction No. 2 given.

John Lindsay, judge.

As to what constitutes the making of a valid mining location, you are instructed that only a person who is a citizen of the United States, or one who has declared his intention to become such,
68 can be a locator of a mining claim under the laws of the United States and the State of Montana; also that as a prerequisite to the making of a valid location, the locator must discover upon the unappropriated lands belonging to the United States, a vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. The discoverer of such lode or vein may locate a claim upon said vein or lode by defining the boundaries of the claim, in the manner prescribed by law, and by posting a notice of such location at the point of discovery; which notice must contain: The name of the lode or claim; the name of the locator or locators; the date of the location; and the number of lineal feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be.

Instruction No. 3 given.

John Lindsay, judge.

Before the expiration of ninety days from the date of posting such notice upon the claim, the locator or locators must sink a discovery shaft upon the lode or claim, to the depth of at least ten (10) feet from the lowest part of the rim of said shaft, or deeper, if necessary to show a well defined crevice or valuable deposit. The locator or locators must define the boundaries of his or their claim by mark-
ing a tree or rock in place, or by setting a post or stone at
69 each corner or angle of the claim. When a post is used it must be at least four (4) inches square by four feet six inches (4–6) in length, set one (1) foot in the ground with a mound of earth or stone four (4) feet in diameter by two (2) feet in heig*th* around the post. When a stone is used not a rock in place, it must be at least six (6) inches square and eighteen (18) inches in length set two-thirds (⅔) of its length in the ground, which trees, stakes, or monuments, must be so marked as to designate the corners.

Within ninety days of the posting of the location notice upon the claim, there must be filed in the office of the county clerk of the county in which the lode or claim is situated, a declaratory statement which must contain: The name of the lode or claim, the name of the locator or locators; the date of the location, and such description of the location of said claim with reference to some natural

object, or permanent monument, as will identify the claim. The number of lineal feet claimed in length along the course of the vein each way from the point of discovery with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be, the dimensions and locations of the discovery shaft, or its equivalent, sunk upon the lode; the location and description of each corner, with the markings thereon, and such declaratory statement must be verified by the oath of the
70 locator, or one of the locators, and in case of a corporation by an officer thereof duly authorized to act.

Instruction No. 4 given.

You are instructed that to entitle the plaintiff to recover in this action, you must believe from the evidence that the locating of the "Keynote" quartz lode mining claim, all of the requirements to constitute a valid location have been complied with by him, for if you should find that any one of said requirements was not complied with in the making of such location, then you cannot find that the "Keynote" was ever a valid location, or that the plaintiff ever acquired any rights thereunder.

Instruction No. 5 given

John Lindsay, judge.

You are instructed that the first requisite to the making of a valid mining location is the discovery, and to constitute a valid discovery, the locator must find a lode or vein bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, and this discovery must be within the boundaries of the location claimed; in other words the locator after he has made his discovery, must so stake and mark his boundaries that the point of discovery will fall within the exterior lines bounding the said claim in this case if you believe from the evidence that the discovery made by the plaintiff in this action was not within the lines or boundaries of the claim subse-
71 quently laid out and marked by him, then the plaintiff in this action cannot recover. You are further instructed that a location based upon a discovery made upon the existence of another valid location is void.

Instruction No. 6 given.

John Lindsay, judge.

When a prospector has made such discovery as will satisfy the law and form a basis of location, he is required under the laws of the State of Montana, before the expiration of ninety (90) days from the date of posting such notice of location upon the claim, to sink a discovery shaft upon the lode or claim to the depth of at least ten

(10) feet from the lowest part of the rim of such shaft, or deeper if necessary, to show a well defined crevice or valuable deposit.

Therefore, if you find from the evidence in this case that the plaintiff did not sink such discovery shaft upon the lode or claim to the depth of at least ten (10) feet from the lowest part of the rim of such shaft at the surface, or deeper, if you should find that it was necessary to sink deeper in order to show a well defined crevice or valuable deposit, then the plaintiff cannot recover in this action as he has failed to comply with one of the requisites to the making of a valuable location, and your verdict should be for the defendant;

72 if, however, you should find from the evidence that the plaintiff has done work upon the said claim, which under the law is equivalent to sinking a discovery shaft, a cut, a cross-cut, or a tunnel, which cuts a lode at the depth of ten feet below the surface, or an open cut of at least ten ft. in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft.

Instruction No. 7 given.

John Lindsay, judge.

You are instructed in this case that the defendant is in possession of the premises in dispute, and it devolves upon the plaintiff to establish by a preponderance of the testimony, his right to the possession of the said premises by showing a valid location, and if he fails in this respect, your verdict must be for the defendant.

Instruction No. 8 given.

John Lindsay, judge.

You are instructed that the discovery must be within the limits of the location and upon land that is free and open to exploration, and the same rule applies to the discovery shaft but does not require that the development work shall be performed at the point where the discovery is first made. The locator may make any shaft he may sink his discovery shaft, provided, always, that he discloses within it a well defined crevice, or mineral in place.

73 Instruction No. 9 given.

John Lindsay, judge.

You are instructed that it is conceded by the plaintiff herein, that the discovery shaft which was sunk by the plaintiff Ben Baker is outside the lines of the "Keynote" quartz lode mining claim, as the same is now staked upon the ground. It is contended, however, by the plaintiff, that some one has moved the stake at the northwest corner of the "Keynote" claim and that the discovery shaft is

within the lines of the claim as it was originally staked. You are instructed that the presumption of law is that the stake on the northwest corner of this claim was originally placed where it now stands, and the burden of proving otherwise in this case is upon the party alleging it, viz., the plaintiff. In this case it devolves upon the plaintiff Ben Baker to prove by a preponderance of the testimony that the stake has been moved as alleged and unless he does so, it is your duty to return a verdict for the defendant.

Instruction No. 10 given.

John Lindsay, judge.

You are instructed that if you believe that any witness in this trial has wilfully sworn falsely to any material fact in issue, you are at liberty to disregard the whole or any part of such witnesse's testimony.

And upon the submission of the case to the jury, the defendant requested the court to give certain instructions numbered
74 8, 10, 11, 12, 13, 14, 15 and 18, which instructions the court refused to give and which instructions so refused are in words and figures as follows, to-wit:

Defendant's refused.

Instruction No. 8.

You are further instructed that if you find that the defendant's predecessor in interest, John T. Lewis, made a valid location of the premises in dispute under the name of the "Keyno" quartz lode mining claim prior to the location made by the plaintiff and that the defendant had succeeded to the rights and interest of said John T. Lewis, and that the requisite annual labor has been performed thereon by the defendant, or others in its behalf, or by its predecessors in interest, then your verdict must be for the defendant and against the plaintiff.

Defendant's refused.

Instruction No. 10.

Mere imperfections in the certificate of location will not render it void. In matters of description, calls that are erroneous will not destroy the validity of the notice or certificate of location, if by excluding them a sufficient description remain to enable its application to be ascertained.

Defendant's refused.

Instruction No. 11.

You are instructed that the defendant in this action has
75 introduced in evidence a notice or certificate of location of the "Keyno" Lode claim, embracing the ground in dispute, which notice or certificate of location, with its verifications or certificate of recordation, you are instructed are valid and sufficient under the laws of the United States and the State of Montana.

Defendant's refused.

Instruction No. 12.

You are instructed that inasmuch as each of the parties to this controversy claim the land in question, under mining locations, that if you should find from the evidence that at the time of the commencement of this action, neither party to said action claimed under a valid and subsisting mining location, your verdict must be for the defendant.

Defendant's refused.

Instruction No. 13.

You are instructed, gentlemen of the jury, that it is conceded by both the plaintiff and the defendant herein, that the defendant Butte City Water Company is now, and was at and prior to the commencement of this action, in the actual possession of the premises in dispute herein. This being the case you are instructed that possession alone of the premises without any title thereto, is sufficient right to maintain the possession of the premises against all the world, until someone else shows a valid title; and in
76 this case you are instructed that even though you should believe from the testimony that the location of the "Keyno" quartz lode mining claim which was made by John T. Lewis was invalid and did not comply with the requisites of the law, you are nevertheless to return a verdict for the defendant herein, unless, however, you further find that the plaintiff Ben Baker has made a valid mining location on the premises in question and that in doing so he complied with all the requirements of the law relating thereto, as elsewhere in these instructions set out.

Defendant's refused.

Instruction No. 14.

You are further instructed that the burden of proof in the case is on the plaintiff Ben Baker, and that it devolves upon him to prove by a preponderance of the testimony each and every material allegation in his complaint set out and contained, and unless he does so it is your duty to return a verdict for the defendant.

Defendant's refused.

Instruction No. 15.

You are further instructed that the plaintiff herein relies upon a relocation of an abandoned claim, and that it is necessary for him to prove by a preponderance of testimony, the location and abandonment of the alleged abandoned claim, and if he fails in this respect you must return a verdict for the defendant.

77 Defendant's refused.

Instruction No. 18.

You are instructed, gentlemen of the jury, that the plaintiff in this case, Ben Baker, relies upon a relocation of the Ballarat tunnel claim. Unless he has made a valid relocation he cannot recover in this action, and in such case your verdict must be for the defendant. In order that there be a valid location of any mining claim, there must have been a prior valid location or something equivalent of the same property. It devolves therefore, upon the plaintiff in this case to prove to you by a preponderance of the testimony that there was a prior valid location of a mining claim known as the Ballarat tunnel. The plaintiff herein having wholly failed to introduce any testimony whatever as to any prior valid location of the claim which he alleges that he relocated, you are instructed to return a verdict for defendant in this case, The Butte City Water Company.

(Filed July 20th, 1899.)

And upon the submission of the case to the jury, the defendant requested four special findings and the same are in this statement and bill of exceptions hereinafter contained.

And thereupon the jury retired to consider their verdict and special findings.

And thereafter and on the 20th day of July, 1899, the jury returned into court and rendered a verdict which is in words
78 and figures as follows, to-wit:

(Title of Court and Cause.)

Verdict.

We the jury in the above entitled action, find for the plaintiff upon all of the issues in this case, and find that he is the owner and entitled to the possession of the Keynote quartz lode mining claim, described in the complaint, and that the defendant withholds the possession of the same from him and for costs of suit.

JOHN J. HARRINGTON, *Foreman.*

Filed July 2nd, 1899.

And at the same time the jury returned the special findings which were submitted to them and which are heretofore referred to, to which special findings and the answers thereto are in words and figures as follows, to-wit:

(Title of Court and Cause.)

Request for Special Findin-s.

1. Was the defendant in this action The Butte City Water Company, at the date of the commencement of this action, in possession of the ground in controversy?

Answer. No.

JOHN J. HARRINGTON, *Foreman.*

2. Was the discovery shaft which was sunk by the plaintiff Ben Baker, sunk outside of the lines of the location made by him,
79 viz., the "Keynote" quartz lode location?

Answer. No.

JOHN J. HARRINGTON, *Foreman.*

3. Was the discovery shaft which was sunk by the plaintiff sunk ten (10) feet deep from the lowest part of the rim of said shaft at the surface?

Answer. Yes.

JOHN J. HARRINGTON, *Foreman.*

4. Did the discovery shaft which was sunk by the plaintiff herein show a well defined crevice or valuable deposit?

Answer. Yes.

JOHN J. HARRINGTON, *Foreman.*

(Filed July 20, 1899.)

And thereafter and on the 29th day of July, 1899 the plaintiff filed his motion in writing for judgment in accordance with the verdict and the findings which motion is as follows, to-wit:

(Title of Court and Cause.)

Motion for Judgment.

Comes now the above named plaintiff and renews in writing the verbal motion heretofore made herein upon the 20th day of July, 1899, and moves the court that it enter judgment in accordance with the verdict of the jury herein, and the special findings made
80 herein, this motion being based upon the pleadings and issues framed therein, in this case and upon the issues as found by the jury in the special findings, and in the general verdict.

J. E. HEALY,
Attorney for said Plaintiff.

Filed July 29, 1899.

6—109

Said motion came on duly for hearing, counsel appearing respectively for plaintiff and defendant, and thereupon the court made the following order:

Journal entry, July 31st, 1899, Journal " P," page 379.

This day motion to adopt findings and for judgment is argued by counsel and by the court sustained with the exception of finding No. 1, and judgment is ordered entered herein in accordance with said verdict. Stay of execution is by the court granted pending determination of motion for a new trial upon defendant filing a bond in the sum of $100.00 to which order counsel for plaintiff duly excepted. By consent defendant is granted 40 days' additional time in which to prepare and serve statement on motion for a new trial and bill of exceptions herein.

And the court ordered judgment entered in favor of plaintiff and against defendant, to which action of the court and the whole thereof the defendant then and there duly excepted.

81 And thereafter and in accordance with said order judgment was entered in favor of the plaintiff and against the defendant which judgment is in words and figures as follows, to-wit:

(Title of Court and Cause.)

Judgment.

This action came on regularly for trial. The said parties appeared by their respective counsel, J. E. Healy, Esq., appearing for the plaintiff, and Messrs. Wellcome and Root, William H. De Witt, and T. Bailey Lee, Esquires, appearing for the said defendant. A jury was regularly empaneled and sworn to try the said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence and the arguments of counsel, and the instruction of the court, the jury retired to consider their verdict, and subsequently returned into court, with the verdict signed by their foreman, and being called answered to their names and say:

We the jury in the above entitled action, find for the plaintiff upon all the issues in this case and find that he is the owner and entitled to the possession of the "Keynote" quartz lode mining claim, described in the complaint and that the defendant withholds the possession of the same from him, and for costs of suit.

(Signed) JOHN J. HARRINGTON, *Foreman.*

82 Said jury further returned the following special findings on the issues in the case to-wit:

2. Was the discovery shaft which was sunk by the plaintiff Ben Baker, sunk outside of the lines of the location made by him, viz.: The Keynote quartz lode location.

Answer. No.

(Signed) JOHN J. HARRINGTON, *Foreman.*

3. Was the discovery shaft which was sunk by the plaintiff sunk ten (10) feet deep from the lowest part of the rim of said shaft at the surface?

Answer. Yes.

4. Did the discovery shaft which was sunk by the plaintiff herein show a well defined crevice or valuable deposit?

Answer. Yes.

(Signed) JOHN J. HARRINGTON, *Foreman.*

Which verdict and special findings being read to the jury and they being duly polled and answering to their names, they say such is their verdict.

Whereupon the court orders the said verdict and special findings filed and entered and orders the judgment on the same reserved for argument until Monday the 31st day of July, 1899, and there-
83 upon after hearing argument of counsel, the court orders and adjudges that a judgment be entered in accordance with the said verdict and special findings.

Wherefore, by virtue of the law and the premises, and by reason thereof it is ordered, adjudged and decreed: that the plaintiff do have and recover of and from the said defendant the possession and the right and exclusive right of possession, as against the said defendant, of the property described in the complaint to wit: the Keynote quartz lode mining claim, the notice of location and declaratory statement of which is recorded in Book "S" of Quartz Lodes page 47, records of Silver Bow county, and it is further adjudged and ordered that the said plaintiff is the owner of and entitled to the possession of the said Keynote quartz lode mining claim, and it is further ordered and adjudged that the plaintiff do have and recover of and from the said defendant the sum of $52.10 costs herein.

JOHN LINDSAY, *Judge.*

Dated August 1, 1899.
(Filed August 1, 1899.)

And thereafter and on the 29th day of July, 1899, the defendant served and filed its notice of intention to move for a new trial which notice is as follows, to wit:

84 (Title of Court and Cause.)

Notice of Motion for New Trial.

To the above named plaintiff, and to J. E. Healy, his attorney:

You will please take notice that the defendant above named intends to move for a new trial in the above entitled case and hereby designates the grounds upon which the motion will be made as follows:

First. Newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered at the trial.

Second. Insufficiency of the evidence to justify the verdict and the findings, and that the verdict and the findings are against the law.

Third. Error in law occurring at the trial and excepted to by the defendant. This motion will be made upon affidavits to be filed and upon a statement of the case to be prepared and settled.

WELLCOME & ROOTE,
WILLIAM H. DE WITT, AND
T. BAILEY LEE.

Due service of the within notice of motion for new trial is admitted this 29th day of July, 1899.

J. E. HEALY,
Attorney for Plaintiff.

(Filed July 29th, 1899.)

And upon the rendering of judgment the court on the consent of the plaintiff's counsel ordered that the defendant have forty
85 days' additional time in which to prepare and serve statement on motion for new trial and bill of exceptions.

And thereafter and on the 8th day of August 1899, the court made an order extending the time in which defendants might serve and file affidavits on motion for a new trial to the 8th. day of September, 1899.

And thereafter and on the 24th day of August 1899, defendant served and filed to be used on the motion for new trial the affidavit of Malcolm S. Macdonald, which affidavit and the affidavit of service are as follows, to-wit:

(Title of Court and Cause.)

Affidavit of Service.

THE STATE OF MONTANA, } ss:
County of Silver Bow, }

T. Bailey Lee being duly sworn says: That he is over twenty-one years of age and an attorney by profession residing in the city of Butte, Montana, that he is one of the attorneys for the above named defendant. That between the hours of two and three in the afternoon of August 23rd, 1899, he personally served the hereto attached affidavit of Malcolm L. Macdonald upon the above named plaintiff's attorney, J. E. Healy Esq., by showing him the said affidavit of Malcolm L. Macdonald and presenting him with a copy of the same.

T. BAILEY LEE.

86 Subscribed and sworn to before me this 23rd day of August, 1899.

J. C. GALBRIATH,
Notary Public for Silver Bow County, Montana.

(Title of Court and Cause.)

Affidavit of Malcolm L. Macdonald.

THE STATE OF MONTANA, } ss:
County of Silver Bow, }

Malcolm L. Macdonald being duly sworn says: That he is one of the surveyors who testified at the trial of the above entitled cause; that he is acquainted with —— Robinson, one of the witnesses who testified in the same cause; that prior to the trial to-wit on July 8th, 1899, while affiant was engaged in surveying the property in controversy the said Robinson approached affiant and asked him what would the defendant in the above cause pay him, Robinson, to handle the case and expressed the desire to collect evidence and data for said defendant to which affiant replied that he did not know.

And affiant further says that the facts recited in this affidavit were never communicated to the plaintiff or any of its officers, agents or attorneys until after the trial of the case; that he did not communicate said facts for the reason that they did not occur to him and he did not think of the same until after the trial. Affiant further says that if a new trial is granted in this case he will testify to the
87 facts as above set forth.

MALCOLM L. MACDONALD.

Subscribed and sworn to before me this 22nd. day of August, 1899.

A. E. HOBART,
Notary Public for Silver Bow County, Montana.

Service of the foregoing copy accepted this — day of August, 1899.

(Filed Aug. 24, 1899.)

The errors of law and specifications of particulars in which the evidence is insufficient to sustain the verdict and findings are as follows to-wit:

Specifications of Errors at Law Occurring at the Trial and Excepted to by the Defendant.

I.

The court erred in setting aside finding No. 1 and ordering a judgment upon setting aside said finding for the reason that the action was ejectment, a law action, and in law action, the court has no authority to set aside a finding or a verdict, and if finding No. 1 had been allowed to stand as it was made, judgment would have been rendered for the defendant instead of the plaintiff for the reason that by such finding No. one it was decided that the defendant was not in possession and therefore the action of ejectment would not lie.

88

II.

The court erred in overruling the following objection made by counsel for the defendant, to the introduction in evidence of the record of the Keynote quartz lode mining claim, to-wit: "Defendant objects to the introduction of the record offered in evidence, for the reason that upon the face of the notice of location it purports to be a relocation of the Ballarat tunnel; and upon the further grounds that the alleged notice of re-location does not state whether a new discovery, shaft was sunk, or whether the old discovery shaft of the Ballarat was sunk ten feet deeper; that as yet no evidence has been introduced showing that there ever was any such mining location as the Ballarat tunnel location; and because it is not proper to be introduced in evidence until these facts have first been proven; it does not comply with section 3615 of the Political Code."

III.

The court erred in admitting in evidence the record of the notice of location of the Keynote quartz lode mining claim, offered in evidence by plaintiff and objected to by defendant.

IV.

The court erred in sustaining the objection of counsel for the plaintiff to the following question, put by counsel for defendant to the witness Ben Baker, to-wit: "Q. You had a conversation
89 with Mr. Healy and Mr. Andrew Laden before you went out there to make that location concerning it: Didn't you have an understanding among yourselves?"

V.

The court erred in overruling defendant's motion for a non-suit at the conclusion of plaintiff's case which said motion for a non-suit

was as follows to-wit: "The defendant at this time moves the court for a non-suit and asks that the plaintiff's case be dismissed, for the following reasons: Because the plaintiff has wholly failed to make out a case; because he has failed to show a valid location of a mining claim on the premises in question; because the allegations in his complaint are not proven; because it appears from the testimony introduced by the plaintiff that he has not complied with section 3611 of the Political Code of the State of Montana, and section 3615 of the same Code, in this,—that he has not, after the posting of his notice, and within ninety (90) days, sunk a discovery shaft upon the lode or claim to the depth of at least ten (10) feet from the lowest part of the rim of said shaft at the surface, nor did he do equivalent work in a cut, cross-cut or tunnel, which cuts a lode at the depth of ten (10) feet below the surface; nor an open cut at least ten (10) feet in length along the lode from the point where the lode is discovered."

VI.

90 The court erred in refusing to admit in evidence the notice of location of the Keyno quartz lode mining claim, offered in evidence by the defendant and objected to by the plaintiff, which said notice of location is in words and figures as follows:

(This notice of location will be found hereinbefore in this record at page 36.)

The objection made to this location notice was that it did not contain a statement of the dimensions and location of the discovery shaft or its equivalent upon the said lode mining claim as required by sec. 3612 of the Political Code, whereas there was no necessity that the notice should contain such statement for the reason that this requirement of the statute imposes a burden upon locators of mining claims additional to that imposed by the mining laws of the United States, and the legislature of Montana is without authority to require such statement.

VII.

The court erred in refusing to admit in evidence the deed from John T. Lewis to the Butte City Water Company, which deed was offered by the defendant and objected to by the plaintiff, and which said deed conveyed the Keyno quartz lode mining claim to the Butte City Water Company.

VIII.

The court erred in refusing to submit to the jury at the request of the defendant, a special finding as follows, to-wit:

91 "Was the discovery of the Keynote Lode mining claim made within the boundaries of a prior valid mining location?

IX.

The court erred in refusing to give instructions asked by the defendant, numbered 12, 13, 14, 15, and 18, which are in words and figures, respectively as follows, to-wit:

"No. 12. You are instructed that inasmuch as each of the parties to this controversy claim the land in question, under mining locations, that if you should find from the evidence that at the time of the commencement of this action, neither party to said action claimed under a valid and subsisting mining location, your verdict must be for the defendant."

"No. 13. You are instructed, gentlemen of the jury, that it is conceded by both the plaintiff and defendant herein, that the defendant Butte City Water Company is now, and was at and prior to the commencement of this action, in the actual possession of the premises in dispute herein. This being the case, you are instructed that possession alone of the premises without any title thereto, is sufficient right to maintain the possession of the premises against all the world, until someone else shows a valid title; and in this case you are instructed that even though you should believe from the testimony that the location of the "Keyno" quartz lode
92 claim which was made by John T. Lewis was invalid and did not comply with the requisites of the law, you are nevertheless to return a verdict for the defendant herein unless, however, you further find that the plaintiff Ben Baker has made a valid mining location on the premises in question, and that in doing so he complied with all the requirements of the law relating thereto, as elsewhere in these instructions set out."

No. 14. You are further instructed that the burden of proof in this case is on the plaintiff Ben Baker, and that it devolves upon him to prove by a preponderance of the testimony each and every material allegation in his complaint set out and unless he does so it is your duty to return a verdict for the defendant."

No. 15. You are further instructed that the plaintiff herein relies upon a relocation of an abandoned claim, and that it is necessary for him to prove by a preponderance of the testimony the location and abandonment of the alleged abandoned claim, and if he fails in this respect you must return a verdict for the defendant."

No. 18. You are instructed, gentlemen of the jury, that the plaintiff in this case, Ben Baker, relies upon a relocation of the Ballarat tunnel claim. Unless he has made a valid relocation he cannot recover in this action, and in such case your verdict must be for the defendant. In order that there may be a valid relocation of
93 any mining claim, there must have been a prior valid location or something equivalent of the same property. It devolves, therefore, upon the plaintiff in this case to prove to you by a preponderance of the testimony that there was a prior valid location of a mining claim known as the Ballarat tunnel. The plaintiff herein having wholly failed to introduce any testimony what-

ever as to any prior valid location of the claim which he alleges that he relocated, you are instructed to return a verdict for the defendant in this case The Butte City Water Company."

I.

The evidence is insufficient to sustain special finding No. 2 which finding is as follows:

"2. Was the discovery shaft which was sunk by the plaintiff Ben Baker sunk outside of the lines of the location made by him, viz., the "Keynote" quartz lode location.

Answer. No.

JOHN HARRINGTON, *Foreman.*"

The defendant specifies the particulars of insufficiency of the evidence to sustain this finding as follows:

The court gave as appropriate to this contention instruction No. 9. The plaintiff in this case contends that the stake at the northwest corner of the mining claim in controversy and claimed by plaintiff in this action of ejectment, has been moved some
94 two hundred feet, while the plaintiff in this case admits that the other three corners are now located where they were originally placed. The following witnesses: John T. Lewis, Rollin Hall, T. H. Miles, M. L. McDonald and S. H. Northey, testified and each of them testified that the stake at the northwest corner of the Keynote Lode mining claim presented the same physical appearance as to age, weather wear, topography and size as the stakes at the other three corners. The witness John T. Lewis testified that the end lines of the mining claim in question as now staked are of about the same length, in other words, the mining claim is of about the same width at each end. There is no contention upon the part of the plaintiff that any of the other three corners have been moved, and it is contended by him that the claim as he originally staked it was as near a perfect rectangular parallelogram as he could make it. The only witness who testified for the plaintiff as to the stake at the northwest corner being moved, were the plaintiff himself and his employee A. J. Robertson. Their testimony was that they are convinced that the stake has been moved for the reason that when they staked the claim they cut a tree down and prepared a stake from the trunk thereof and carried the same over two hundred feet to where they placed it in the ground and that the stake now stands about twenty feet from the stump of the tree which they cut down. The testimony
95 of these two witnesses as well as the witnesses above named was to the effect that there were trees on the surrounding ground of sufficient size to make stakes for mining claims and that there were a large number of trees of sufficient size to make stakes for mining claims near the point where plaintiff claims to have originally placed the stake. The plaintiff and his witness

A. J. Robertson also testified that they dug a circular ditch around the stake at the northwest corner of the mining claim in question and made a mound of earth two feet high and four feet in diameter. The testimony of all of the above named witnesses is that such a mound and ditch now surround the stake at the northwest corner where defendant claims it was originally placed and where the same is now situated. Again each and all of the above named witnesses testified that they walked all over the surrounding ground and could not find where any stake had been placed or mound built or ditch dug there other than where the stake at the northwest corner of the said mining claim now is. The significance of this fact is this, to-wit, that if this disputed northwest corner stake were placed as it was originally as defendant contends at the place where the mound appears then the discovery shaft of plaintiff would be outside of the claim, and if this northwest corner were placed as
96 plaintiff contends it was originally, the discovery shaft would be within the claim, and plaintiff contends that he originally made, practically, a rectangular parallelogram. Such rectangular parallelogram is made if this northwest stake were placed as it now stands but such rectangular parallelogram was not made if the northwest stake were placed at the point where plaintiff contended it was and if plaintiff's contention is right, instead of the figure being a rectangular parallelogram it is a trapezoid. The claim is a very small one only about six hundred feet long and three hundred feet wide, and therefore such glaring irregularities would more manifestly appear in a small claim than in one of standard size. Furthermore, if anyone undertook to work a fraud by moving one end stake he would naturally move the other end stake in the same direction and the same distance in order to perpetuate a cymmetrical fraud and maintain the shape of the parallelogram.

II.

The evidence is insufficient to justify finding No. 3 which is as follows:

"3. Was the discovery shaft which was sunk by the plaintiff sunk ten (10) feet deep from the lowest part of the rim of said shaft at the surface?

Answer. Yes.

JOHN J. HARRINGTON, *Foreman.*"

97 The particulars of such insufficiency are as follows: It is important and in fact vital in this case whether the discovery shaft were sunk ten feet deep or not. The only positive testimony of depth is by defendant's witnesses: M. L. Macdonald, and Rollin Hall. These witnesses testified to the depth of the shaft from measurements made by instruments the witnesses for plaintiff, himself and A. J. Robertson testified that they measured with spans made with their hands. The defendant submits that a hand measurement

in this way is simply an estimate and may not prevail over an absolute measurement made by rule.

III.

The evidence is insufficient to justify the general verdict of the jury in this case, for the following reasons, to-wit:—

1. Because the evidence fails to show by a preponderance of testimony that the mining location under which the plaintiff claims, was a valid and subsequent one at the time the plaintiff claims to have been ousted by the defendant.

2. Because the evidence does not show that Baker plaintiff and locator of the Keynote Lode mining claim sank a discovery shaft upon the claim to the depth of ten feet from the lowest part of the rim of said shaft. This insufficiency is heretofore set out in defend-
ant's specification to the insufficiency of the evidence to sus-
98 tain finding No. III and such specification is hereby made a part hereof.

3. Because the evidence fails to show whether the plaintiff Ben Baker sank a new discovery shaft, ten feet deep from the lowest part of the rim thereof or whether he drove the old discovery shaft ten feet deeper.

4. The evidence shows that the alleged discovery if any at all were made by Ben Baker on the Keynote claim was made outside of the lines of the claim. This specification is fully set forth in the specifications to the insufficiency of the evidence to justify finding No. 2, which specification heretofore made is hereby referred to and made a part hereof.

5. The plaintiff in his complaint seeks to recover possession of a mining claim by the name of "Keynote" Lode mining claim, which he alleges was a re-location of the Ballarat Tunnel Lode mining claim. There is absolutely no evidence whatever showing or tending to show that there ever was any mining claim at or anywhere near the premises in dispute prior to the time when the plaintiff made his location. There was no evidence whatever offered upon this subject and the plaintiff wholly failed to offer any testimony or evidence to show that there was any prior locations of any mining claim whatever either by the name of the Ballarat tunnel or by any other name.

99 6. Because it is testified to by defendant's witnesses and conceded by the plaintiff that the discovery shaft of the alleged Keynote Lode mining claim is wholly without the lines of that claim as the stakes now stand upon the ground and that the only method by which plaintiff's witnesses thought to bring such discovery within the lines was by testimony claimed to show that the northwest stake had been moved from its original position.

IV.

The insufficiency of the evidence to justify the general verdict is the same as that heretofore specified as to insufficiency to justify

finding No. 2, and said specification is hereby referred to and made a part hereof.

And now the defendant presents this its statement on motion for new trial, and bill of exceptions to the judge for settlement and the same is hereby signed, settled and allowed and is correct.

JOHN LINDSAY, *Judge.*

Done this — day of ——, 1899.
Filed Oct. 21st, 1899.

(Title of Court and Cause.)

Affidavit of T. B. Lee.

T. B. Lee, being first duly sworn says: That he is over twenty-one years of age; that he is an attorney by profession and a resident of the city of Butte, Silver Bow county, Montana, and one of
100 the attorneys for the defendant herein; that on the 5th day of September, 1899, to-wit, in the afternoon of said day, between the hours of two and four, he served the hereto annexed statement on motion for a new trial upon plaintiff's attorney of record, J. E. Healy, Esq.; that after many attempts having been unable to find the said J. E. Healy in his office, he finally found him in department No. 2 of this court; that he handed him the hereto annexed draft of statement on motion for new trial with the remark "Here is the statement on motion for new trial in the Water Co. case" or words to that effect but did not say it was the original draft; that he asked the said J. E. Healy to walk with him outside the court-room so that service could be made in a professional way; that the said J. E. Healy said that he thought that the matter would be all right inside. Whereupon, without further conversation affiant left with the said J. E. Healy the said hereto annexed statement on motion for new trial.

T. BAILEY LEE.

Subscribed and sworn to before me this 16th day of September, 1899.

E. L. ARNOLD,
Notary Public in and for the County of Silver Bow, Montana.

(Filed Sept. 16th, 1899.)

(Title of Court and Cause.)

Notice of Appeal.

No. 7618.

101 To J. E. Healy, attorney for plaintiff, Ben Baker:

You will please take notice that the defendant Butte City Water Company, in the above entitled action, hereby appeals to the supreme court of the State of Montana from the judgment entered in the above entitled case dated August 1st, 1899, and filed on August 1st, 1899, in favor of the plaintiff and against the defendant and from the whole of said judgment.

WILLIAM H. DE WITT,
T. BAILEY LEE,
Attorneys for Defendant.

I hereby admit that the above notice was served upon me in the county of Silver Bow, State of Montana on the 23rd day of April 1900, by delivery to me of a duplicate of the same. I save all objections heretofore made.

J. E. HEALY,
Attorney for Plaintiff.

THE STATE OF MONTANA, } ss:
County of Silver Bow, }

T. B. Lee being duly sworn says: That he is one of the counsel for the defendant named in the above notice of appeal; that he served the above notice of appeal upon J. E. Healy, attorney for plaintiff on the 23rd day of April, 1900, at the city of Butte county of Silver Bow State of Montana by delivering to and leaving with said Healy a duplicate of said notice of appeal.

T. BAILEY LEE.

102 Subscribed and sworn to before me this 23rd day of April, 1900.

J. C. GALBRAITH,
Notary Public for Silver Bow County.

Filed April 23, 1900.

THE STATE OF MONTANA, } ss:
County of Silver Bow, }

I Clinton C. Clark, clerk of the district court of the second judicial district of the State of Montana in and for the county of Silver Bow do hereby certify that the foregoing are correct copies of the following papers in the case of Ben Baker, plaintiff *vs.* Butte City Water

Company, defendant on appeal from the judgment, to-wit: The notice of appeal the judgment roll, all bills of exceptions and the statement in the case which is the statement which was used on motion for new trial the bill of exceptions and statement on motion for new trial contains the judgment roll, to-wit: the complaint, answer, which were all the pleadings in the case, the verdict and the judgment and the findings of the jury and all bills of exceptions taken and filed and the judgment.

In witness whereof I have hereunto set my hand and affixed my official seal this 14th day of June, 1900.

CLINTON C. CLARK,
Clerk of the District Court of the Second Judicial
103 *District of the State of Montana in and for the County of Silver Bow.*

[SEAL.]

104 STATE OF MONTANA:

In the Supreme Court, March Term, 1903.

BEN BAKER, Plaintiff and Respondent,
vs.
BUTTE CITY WATER COMPANY, Defendant and Appellant. } No. 1568.

Submitted: May 11" 1903 Decided: May 20" 1903

Filed: May 20" 1903.

——, *Clerk.*

105 Opinion by Mr. Chief Commissioner CLAYBERG:

This was an action in ejectment. Plaintiff alleged ownership of the premises in question; an illegal ouster therefrom by defendant, and an unlawful withholding of the possession thus acquired. The defendant denied plaintiff's ownership and that the ouster was illegal. It then affirmatively alleged "that at all times mentioned in plaintiff's complaint it was and now is the owner of, in possession of, and entitled to the possession of the premises described in plaintiff's complaint."

The question of the possession of the premises was not, therefore, an issue in the case.

Plaintiff testified without objection that defendant was in possession of the property, and the court instructed the jury as follows: "You are instructed in this case that the defendant is in possession of the premises in dispute, and it devolves upon the plaintiff to establish by a preponderance of the testimony his right to the possession of said premises by showing a valid location, and if he fails in this respect your verdict must be for the defendant."

At the close of the case the defendant requested four special interrogatories to be submitted for findings by the jury, of
106 which that marked No. 1 was as follows: "Was the defendant in this action, The Butte City Water Company, at the date of the commencement of this action, in possession of the ground in controversy?"

The court complied with defendant's request in this regard. The record does not disclose whether plaintiff objected to the submission of this question, but the statement and bill of exceptions was prepared and presented by defendant, and settled in his behalf, and could not properly contain plaintiff's objections or exceptions. (Westheimer *v.* Goodkind, 24 Mont., 90.) So that no presumption can be indulged as to whether plaintiff objected or consented to its submission.

It is very clear that the court ought not to have submitted this question to the jury, because it was upon no issue involved in the case. The jury answered the question in the negative, and at the same time returned a general verdict for plaintiff, reciting therein "that the defendant withholds the possession of the same (the premises in dispute) from him."

The record therefore discloses that the general verdict is inconsistent with this special finding. After the rendition of the verdict plaintiff's attorney moved the court to enter judgment for
107 plaintiff in accordance with the verdict of the jury, which motion after a hearing was sustained by the court.

Defendant gave notice of intention to move for a new trial to be based upon "affidavits to be filed, and upon a statement of the case to be prepared and settled." A statement on motion for a new trial and bill of exceptions was then settled.

The record does not disclose whether a motion for a new trial was ever made or passed upon by the court. The appeal is taken from the judgment only.

The first error assigned is: "The court erred in setting aside finding No. 1."

We cannot consider this alleged error for the following reasons:

1. The record does not disclose either a specific objection or exception to the action of the court in that regard.

The question arose upon the hearing of plaintiff's motion for judgment upon the verdict. The court, in its ruling, stated: "This day motion to adopt findings and for judgment is argued by counsel and by the court sustained with the exception of finding No. 1, and judgment is ordered entered herein in accordance with said verdict."

108 No objection to this action of the court in regard to the special finding is disclosed by the record. The only exception we find which by any possible construction could be held to refer to this action of the court is stated as follows: "The court ordered judgment entered in favor of plaintiff and against defend-

ant, to which action of the court and the whole thereof the defendant then and there duly excepted."

In other words, counsel did not specifically object to the action of the court below in disregarding finding No. 1, and did not specifically except thereto, but relied entirely upon an exception to the entry of judgment. We do not think that this exception is sufficient to warrant consideration of the error assigned.

2. The record does not disclose that the defendant sought in any way or manner to take advantage of the inconsistency of this finding No. 1 with the general verdict, by motion for judgment upon such finding notwithstanding the general verdict. We do not believe that the court was bound, in the absence of any action on the part of defendant indicating any reliance upon this finding, to give the defendant any benefit arising from its existence. How can
109 we say that if defendant had made a motion for judgment upon this finding, disregarding the general verdict, it would not have been granted.

The following authorities hold directly, under statutes almost identical with ours, that in order to have the question of inconsistency between a special finding and general verdict considered or passed upon by the appellate court, the party claiming such inconsistency must move the court below for judgment in his favor upon the special finding: (Tritlipo *v.* Lacy, 55 Ind. 287; T. W. & W. R. W. Co. *v.* Craft, 62 Ind. 395; Bartlett *v.* P. C. & St. L. Ry. Co., 94 Ind. 281; N. W. Mu. Fire Ins. Co., *v.* Blankenship, 94 Ind. 535; Carter *v.* Mo. M. & L. Co., 41 Pac. 356.)

The rule is stated by the text writers as follows: "In order to obtain the advantage of special findings a motion for judgment upon them must be made." (Thompson on Trials, § 2696.)

"A motion for judgment on the special findings is necessary, otherwise the judgment will be entered as a matter of course upon the general verdict. In the absence of such motion in the trial court no question concerning the right to such judgment can be raised on appeal." (20 Enc. Pl. & Pr., 375.)

We agree with the doctrine here announced.

110 The next error specified is that "The court erred in admitting the plaintiff's location notice of the Key Note."

We have examined the notice of location referred to, and the same seems to be regular in every respect, and in accordance with the provisions of the statute of this State.

We therefore are of the opinion that the court correctly admitted it in evidence.

The next error alleged is, that "The court erred in excluding the location of defendant's Keyno claim."

We have examined this notice of location and are satisfied that it does not conform to the statute of the State of Montana, or with the construction thereof by this court in the case of Purdum *v.* Laddin, 23 Mont. 387.

The question as to the right of the legislature to provide rules for

the marking of the boundaries of mining claims and providing for a record of such location and what the recorded paper must contain has so long been recognized in this State, and has so many times been approved by this court, that it would be useless to enter again into any consideration of the questions so decided.

We are satisfied, therefore, that the court did not err in excluding the location notice of the Keyno claim.

111 All other errors specified in the brief have been waived, either in the brief itself, or by counsel for the appellant in his argument before the court.

Finding no error in the record, we advise that the judgment appealed from be affirmed.

JNO. B. CLAYBERG,
Chief Commissioner.

We concur:

W. H. POORMAN, *Commissioner.*
LEW L. CALLAWAY, *Commissioner.*

112 *Per Curiam:*

For the reasons stated in the foregoing opinion the judgment appealed from is affirmed.

THEO. BRANTLY,
Chief Justice.

GEO. R. MILBURN,
Associate Justice.
WM. L. HOLLOWAY,
Associate Justice.

113 In the Supreme Court of the State of Montana.

BEN BAKER, Resp'd't,
vs.
BUTTE CITY WATER Co., App'l't. } 1568.

Forty-seventh day of March term, Wednesday, May 20th, 1903.

This cause this day came on for the judgment and decision of the court.

Whereupon, on consideration, it is now here ordered and adjudged that the judgment of the court below made and entered on the first day of August A. D. 1899 be and the same is hereby affirmed at the cost of appellant. Opinion prepared by Mr. Chief Commissioner Clayberg. All the justices concurring.

114 In the Supreme Court of the State of Montana.

BEN BAKER, Plaintiff,
vs.
BUTTE CITY WATER COMPANY, Defendant. } No. 1568. At Law. Petition for Writ of Error.

Now comes The Butte City Water Company, defendant herein and says:

That on or about the 20th day of May, 1903, this court entered judgment herein in favor of the plaintiff, and against this defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the supreme court of the State of Montana, from the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

FORBIS & EVANS,
Attorneys for Defendant.

Endorsed: Petition for writ of error. Filed July 13" 1903.

115 In the Supreme Court of the State of Montana.

BEN BAKER, Plaintiff and Respondent,
vs.
BUTTE CITY WATER COMPANY, Defendant and Appellant. } No. 1568.

Assignment of Errors.

Comes now the defendant and appellant in the above entitled cause, The Butte City Water Company, and assigns errors in the judgment and decision of the supreme court of the State of Montana, in said cause, as follows, to-wit:

I.

The court erred in affirming the ruling of the lower court in sustaining the plaintiff's objections to the introduction in evidence, and in excluding from evidence the location notice or declaratory statement of the Keyno Lode claim, offered in evidence by the defendant and appellant. (P. 36, printed transcript; p. 49 printed transcript.)

II.

The court erred in holding that the location notice should contain, in order to be valid, a full description of the markings on each boundary stake, used in marking the boundaries of the claim
116 located. It is sufficient if the boundaries be marked on the ground so as to be readily traced and it is not necessary that such markings be set forth in the record.

III.

The court erred in holding that the statutes of Montana (sec. 3612 of Political Code) was valid and mandatory in requiring the record of a quartz claim to contain the dimensions and location of the discovery shaft, and the location and description of each corner with the markings thereon.

IV.

The court erred in holding that the requirements of the statutes of Montana, as to the record containing a description of the corners with markings, and as to the dimensions and location of the discovery shaft, were not in conflict with the statutes of the United States and invalid.

V.

The court erred in holding that the laws of the State of Montana were not in contravention of the statutes of the United States, which provide: (sec. 2323):

"All records of mining claims hereafter made, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

117 VI.

The court erred in holding that the statute of Montana which provides that the record of a quartz claim shall contain the description of the markings upon the boundary stakes, was valid and controlling, and mandatory, for the reason that such statute is not only in conflict with laws of the United States, but interferes with the primary disposition of the soil by the Federal Government, and imposes restrictions upon such disposal.

VII.

The court erred in holding that the statute of Montana was mandatory and valid which required the record of a claim to contain the markings upon boundary stakes, for the reason that such statute is unreasonable and unnecessarily restrictive in providing that evidence shall be incorporated in the record. Such record would accomplish no good purpose, but would unjustly and unnecessarily interfere with the disposition of lands by the General Government.

VIII.

The court erred in holding the State statute to be operative and effective, so far as it attempts to prescribe what shall be contained in a record of mining locations, for the reason that such requirements are set forth in the Federal statute, and no authority has been given to the State to legislate upon the subject.

118 Wherefore defendant and plaintiff in error prays, that the judgment of said supreme court of the State be reversed, and that the said supreme court be directed to grant a new trial in said cause.

FORBIS & EVANS,
Attorneys for Defendant and Appellant.

Endorsed: Assignment of errors.

119 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Montana, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Ben Baker, plaintiff and defendant in error, and The Butte City Water Company, defendant and plaintiff in error, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission of the said Butte City Water Company, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

120 all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 9th day of September 1903, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause

further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13th day of July, in the year of our Lord one thousand nine hundred and three.

Seal United States Circuit Court, District of Montana.

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States, Ninth Circuit, District of Montana.

Allowed by,
THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

121 UNITED STATES OF AMERICA, *State and District of Montana, County of Silver Bow,* } ss:

John E. Corette, being first duly sworn, says on oath: That he is over the age of twenty-one years, and not a party to the above entitled action.

That on the 16th day of July, 1903, at Butte, Silver Bow county, Montana, affiant duly served the foregoing writ of error, and also plaintiff's petition for writ of error, and assignment of errors in the above action, upon James E. Healy, Esquire, attorney for Ben Baker, defendant in error in the above cause, by handing to and leaving with the said James E. Healy true and correct copies of the foregoing writ of error, and also of the said petition for writ of error and assignment of errors.

JOHN E. CORETTE.

Subscribed and sworn to before me this 16th day of July, 1903.

[Notarial Seal of Will Hardcastle, Silver Bow County, Montana.]

WILL HARDCASTLE,
Notary Public in and for Silver Bow County, Montana.

Due service of the above writ of error this 20th day of July, 1903, and a copy left with me at same time is hereby admitted.

HENRY G. RICKERTS,
Clerk of the Supreme Court of the State of Montana.

[Endorsed:] No. 1568. Supreme Court of the United States. Butte City Water Company, plaintiff in error, *vs.* Ben Baker, defendant in error. Writ of error. Filed July 20" 1903. Henry G. Rickerts, clerk.

[Seal United States Circuit Court, District of Montana.]

122 In the Supreme Court of the State of Montana.

BEN BAKER, Plaintiff,
vs.
BUTTE CITY WATER COMPANY, Defendant. } No. 1568. At Law.

Bond.

Know all men by these presents that we, The Butte City Water Company, as principal, and E. B. Weirick and J. A. Talbott, as sureties are held and firmly bound unto the plaintiff, Ben Baker, in the full and just sum of five hundred dollars ($500.00) to be paid to the said plaintiff, Ben Baker, his certain attorneys, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 11th day of July, in the year of our Lord one thousand nine hundred and three.

Whereas lately in the supreme court of the State of Montana, in a suit pending in said court, between Ben Baker, as plaintiff, and The Butte City Water Company, as defendant, a judgment was rendered against The Butte City Water Company, and The Butte
123 City Water Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Ben Baker, citing and admonishing him to be and appear at a session of the Supreme Court of the United States beholden at the city of Washington on the ninth day of September, 1903, next.

Now, the condition of the above obligation is such that if the said Butte City Water Company, shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

BUTTE CITY WATER CO., [SEAL.]
By EUGENE CARROLL, *Supt.*
E. B. WEIRICK. [SEAL.]
J. A. TALBOTT. [SEAL.]

Sealed and delivered in the presence of
JOHN E. CORETTE, *Witness.*

Approved by
THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

124 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

In the Supreme Court of the State of Montana.

I, Henry G. Rickerts, clerk of the said supreme court, do hereby certify and return to the honorable the United States Supreme Court that the foregoing volume, consisting of 123 pages, numbered consecutively from 1 to 123, is a true and correct and complete transcript of the records, process, pleadings, orders and judgment in said cause, and of the whole thereof, as appear from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the writ of error, together with proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, Montana, this 10th day of August, A. D. 1903.

[Seal Supreme Court, State of Montana.]

HENRY G. RICKERTS, *Clerk.*

125 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, ss:

To Ben Baker, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States on the ninth day of September, 1903, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein The Butte City Water Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, in the said supreme court, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of July, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States one hundred and twenty seven.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

126 UNITED STATES OF AMERICA,
State and District of Montana, County of Silver Bow, } ss:

John E. Corette, being first duly sworn, says on oath: That he is over the age of twenty-one years, and not a party to the above entitled action.

That on the 16th day of July, 1903, at Butte, Silver Bow county, Montana, affiant duly served the foregoing citation upon James E. Healy, Esquire, attorney for Ben Baker, defendant in error in the above cause, by handing to and leaving with the said James E. Healy a true and correct copy of the foregoing citation.

JOHN E. CORETTE.

Subscribed and sworn to before me this 16th day of July, 1903.

[Notarial Seal of Will Hardcastle, Silver Bow County, Montana.]

WILL HARDCASTLE,
Notary Public in and for Silver Bow County, Montana.

127 [Endorsed:] No. —. Supreme Court of the United States. Butte City Water Company, plaintiff in error, *vs.* Ben Baker, defendant in error. Citation. Forbis & Evans, attorneys for plaintiff in error.

Endorsed on cover: File No. 19,056. Montana supreme court. Term No. 109. The Butte City Water Company, plaintiff in error, *vs.* Ben Baker. Filed August 25th, 1903. File No. 19,056.